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88-1881

No.: _____

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

ANTHONY INDELICATO,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARK F. POMERANTZ
Attorney for Petitioner
757 Third Avenue
New York, New York 10017
(212) 593-7100

DAVID T. GRUDBERG
Of Counsel

153 Pet

Questions Presented

1. Whether the murder of three people at the same time and place, in the course of one isolated criminal episode, constitutes a "pattern" of racketeering activity under 18 U.S.C. § 1961(5) and 18 U.S.C. § 1962(c), (d)?

2. Whether a defendant may be convicted of racketeering conspiracy under 18 U.S.C. § 1962(d) where the government does not plead or prove that the defendant committed or agreed to commit any racketeering acts within the statute of limitations period?

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No.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANTHONY INDELICATO,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Anthony Indelicato respectfully prays that a writ of certiorari issue to review the judgments of conviction and opinions of the United

States Court of Appeals for the Second Circuit entered on January 13, 1989, and January 31, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals affirming petitioner's conviction in part and reversing it in part is reported at 868 F.2d 524 (2d Cir. 1989), and appears in the Appendix beginning at page 3a. The order of the Court of Appeals denying Indelicato's petition for rehearing of that decision appears in the Appendix at pp. 91a-92a. The earlier in banc opinion of the Court of Appeals ruling on certain portions of petitioner's appeal concerning whether his conduct amounted to a "pattern of racketeering" under the Racketeer Influenced and Corrupt Organizations ("RICO") statute is reported at 865 F.2d

1370 (2d Cir. 1989), and appears in the Appendix beginning at page 42a. The sua sponte order of the Court of Appeals directing this in banc rehearing appears in the Appendix at pp. 1a-2a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 31, 1989. A timely petition for rehearing was denied on March 21, 1989, and this petition for a writ of certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Title 18, United States Code, Section 1961, provides in relevant part as follows:

§ 1961. Definitions

As used in this chapter --

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year . . . .

. . . .

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

. . . .

Title 18, United States Code, Section 1962, provides in relevant part as follows:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with

any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18, United States Code, Section 3282, provides as follows:

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

Petitioner Indelicato was convicted after a jury trial in the Southern District of New York on one count of conspiring to violate the RICO statute, in violation of 18 U.S.C. § 1962(d), and one substantive count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). The proof presented at this lengthy, multi-defendant trial is summarized in the opinion of the court of appeals. (46a-59a). Briefly, the evidence as to petitioner, when viewed in the light most favorable to the government, established that on July 12, 1979, at a restaurant in Brooklyn, New York, Indelicato, who was associated with the Bonanno crime family, participated in the

murder of three individuals -- Carmine Galante, Leonard Coppola, and Giuseppe Turano. The government offered extensive evidence concerning the shooting, but substantially less proof linking Indelicato to the crimes. On this score, it relied primarily on circumstantial evidence (including surveillance proof) of Indelicato's actions prior to and following the shooting, and on fingerprint evidence tying Indelicato to the alleged getaway vehicle. The balance of the case against Indelicato consisted of hearsay, surveillance, and "expert" testimony intended to link the July 12, 1979 shooting incident with an organization known as the "Commission," which was alleged to be the ruling body of organized crime in the New York City area and nationwide.

Insofar as this petition is concerned, the nature of the evidence is less important than the manner in which the indictment, and particularly the charges against Indelicato, was framed. The indictment charged twelve defendants with RICO violations, extortion, illegal labor payoffs, and loansharking. It focused on the Commission, which, as noted above, was alleged to be, in effect, the "board of directors" of the American Mafia; it controlled and coordinated criminal activities of various crime families, including the so-called "five families" that operate in New York City. (46a). The Commission, which according to the indictment had functioned on an ongoing basis at least since 1931, was composed of the "bosses" of the Gambino, Genovese,

Lucchese, Colombo, and Bonanno crime families, along with the bosses of families in other cities. (47a).

Each defendant, including Indelicato, was charged with having participated in the affairs of the Commission through a "pattern of racketeering," in violation of 18 U.S.C. § 1962(c), and with having conspired to do so in violation of 18 U.S.C. § 1962(d). The RICO "enterprise," according to the indictment, was the Commission itself, and the indictment specified that "[t]he Commission was an enterprise distinct from the individual families" whose activities it supervised.

The indictment alleged that many of the defendants had been full-fledged members of the Commission or had participated in Commission affairs on an ongoing basis.

The racketeering acts alleged against various defendants likewise included acts of extortion and loansharking extending over lengthy periods. Thus, much of the trial evidence concerned allegations of extortion in the concrete industry during 1982 and thereafter. (47a-49a).

The case against Anthony Indelicato, however, was far more limited. Although he was named in both RICO counts along with those who allegedly made up the Commission, Indelicato was not alleged to be a Commission member, a boss of a family, or a person who had a leadership role in Commission affairs. Instead, the criminal charges against him were based on the three murders that took place during the single shooting episode on July 12, 1979. (8a). The theory of prosecution was that the

Commission had ordered the murders, and that Indelicato (and unnamed others) had carried them out on the Commission's behalf. (49a).

Each of the three simultaneous murders was charged against Indelicato as a separate predicate act of racketeering. The three murders were the sole racketeering acts charged against Indelicato. Thus, although the indictment alleged that Indelicato had participated in the affairs of the Commission through a "pattern of racketeering activity," the only racketeering activity attributed to him involved this single incident in which the murders took place. Likewise, although the indictment alleged that Indelicato had conspired to conduct the Commission's affairs through a "pattern of racketeering

activity," the Government did not allege that Indelicato had agreed to the commission of predicate acts other than the murders of July 12, 1979.

The indictment against Indelicato was returned on November 19, 1985, more than six years after the 1979 shooting incident. (59a). Accordingly, at the close of the government's case, Indelicato moved to dismiss both RICO counts as time-barred under the applicable five-year statute of limitations, 18 U.S.C. § 3282. Indelicato argued that the RICO substantive count required proof that he committed at least one act of racketeering within the five-year period, and that the conspiracy count required proof that he had conspired to commit at least one act within the limitation period. The district court

denied the motion to suppress, holding that the RICO substantive count required proof only that Indelicato had been associated with the charged enterprise into the limitations period, and that any of the defendants had committed a racketeering act after that date. Likewise, the court held that the conspiracy count required only proof that Indelicato continued to be an associate of the enterprise into the limitations period. The jury was charged in accord with these rulings.

Indelicato also moved, both prior to trial and at the close of the government's case, to dismiss the RICO charges because the government had not alleged or proved a legally sufficient "pattern of racketeering activity" against him, under 18 U.S.C. § 1961(5). In particular, counsel for

Indelicato argued that the simultaneous acts of murder that comprised the "pattern" alleged as to Indelicato lacked the "continuity" required under this Court's decision in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985). Both of these motions also were denied. The jury ultimately convicted Indelicato on the RICO counts, and Indelicato was sentenced to consecutive twenty-year prison terms on each count, and fined $50,000.

On appeal to the Second Circuit, Indelicato renewed his contentions that the RICO convictions were time-barred as a matter of law, and that the trial proof was legally insufficient to establish that he had committed, or conspired to commit, a "pattern of racketeering activity." On the latter argument, Indelicato relied

primarily on Sedima and on post-Sedima decisions in the other circuit courts of appeals, see, e.g., Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986), reading the pattern element of the RICO offense more strictly in the wake of Sedima. In particular, he urged the Second Circuit to overrule its decision in United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986), cert. denied, 107 S. Ct. 3229 (1987), in which it had held that two predicate acts of racketeering, without more, will suffice to satisfy the pattern element.

After the case had been argued to a panel of the court of appeals, but before a decision had been rendered, the court of appeals issued a sua sponte order directing that the portion of Indelicato's appeal

challenging the sufficiency of the government's proof of a RICO pattern be re-briefed and reheard by the court in banc. (1a).

On January 9, 1987, the Second Circuit issued its in banc opinion on Indelicato's RICO pattern claims. The court began by reviewing at length its prior rulings in this area, and concluded that those decisions, particularly those that followed this Court's Sedima decision, had failed to give sufficient independent content to the pattern element of the RICO statute. (10a-26a, 28a-30a). Thus, it explicitly abandoned the view announced in United States v. Ianniello, supra, that two acts, without more, suffice to constitute a pattern. (30a). The court also canvassed the interpretations given the pattern

requirement in other circuits, noting that the Eighth Circuit has held that proof of multiple predicate acts pursuant to a single criminal scheme is insufficient to establish a RICO pattern. See H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S. Ct. 1219 (1988), Dkt. No. 87-1252 (argued November 8, 1988). (26a). It also noted the flexible approach taken by the Seventh Circuit, which requires proof that predicate acts have occurred in separate transactions, i.e., "transactions 'somewhat separated in time and place.'" Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986) (quoting Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (quoting United States v. Moeller, 402 F. Supp. 49, 57 (D.Conn. 1975)). (26a-27a).

The court concluded by announcing a new test for determining whether particular acts constitute a pattern, stressing such factors as the acts' temporal proximity or separation, common goals, and similarity of methods. (31a). In the portion of its ruling most pertinent to this petition, the court concluded that simultaneous acts of racketeering could, in some circumstances, be deemed sufficiently "continuous" to constitute a pattern, provided that they were sufficiently "related" and there was evidence of a "threat" of continued racketeering activity. (33a-34a). In this regard, the court held that evidence of such a threat of continuing criminal activity could be found in the nature of the enterprise pursuant to which the racketeering acts were committed, e.g., an

organized crime group. (34a). Based on this analysis, the court held that Indelicato's simultaneous acts of murder constituted a legally sufficient pattern of racketeering under the RICO statute, primarily because they were committed at the behest of an organized crime group and thus raised a "threat" of continuing activity by Indelicato, whether or not such activity was proved. The court remanded the case to the panel that originally heard it for further proceedings consistent with its opinion.

On January 31, 1989, the panel of the court of appeals affirmed Indelicato's conviction in part and reversed in part. In accord with the earlier in banc ruling, the court rejected Indelicato's claims concerning the sufficiency of the RICO

pattern alleged and proved as to him. (46a). With respect to the statute of limitations claims, the court held that Indelicato's substantive RICO conviction was time-barred, and reversed and dismissed as to that count. The court based its decision on an earlier Second Circuit ruling, United States v. Persico, 832 F.2d 705 (2d Cir. 1987), cert. denied, 108 S. Ct. 1995 (1988), which had been decided while the matter was sub judice, and which held that a substantive RICO charge is timely as to a particular defendant only if that defendant is shown to have committed a predicate act within the five-year limitations period. Id. at 714. (59a-61a).

However, Indelicato's conviction for RICO conspiracy remained standing. The divided

panel ruled that the Commission had continued to function as a RICO enterprise within the limitations period. Since Indelicato had agreed personally to commit a pattern of racketeering acts, albeit before the onset of the limitations period, and since he had not withdrawn from the overall RICO conspiracy, the panel majority held that Indelicato's conviction for RICO conspiracy was not time-barred. Again, the panel expressly relied on the intervening decision in United States v. Persico, id. at 713-14, 721-22, which analogized the RICO conspiracy offense to other non-overt act conspiracies, and held (by two-to-one vote) that the statute of limitations begins to run as to a RICO conspiracy only when the purposes of the conspiracy have either been accomplished or abandoned,

unless a particular defendant can show that he withdrew from the conspiracy before that date. (60a).

Senior Eighth Circuit Judge Bright, sitting by designation, dissented from the decision to affirm Indelicato's conviction for RICO conspiracy. Echoing Judge Newman's dissent in Persico, see 832 F.2d at 721-22, Judge Bright would have reversed Indelicato's RICO conspiracy conviction for lack of proof that Indelicato committed or agreed to commit any racketeering act within the limitations period. (88a-90a). Judge Bright also voiced his disagreement with the in banc court's ruling on Indelicato's RICO pattern claim. While acknowledging that he was bound by that ruling, Judge Bright expressed his view that the Eighth Circuit's requirement of

more than a single scheme for a pattern, see, e.g., Superior Oil Co. v. Fulmer, supra, better embodies the plain meaning of and Congressional intent underlying the RICO statute. Under this rule, he noted, Indelicato's conduct "would not constitute a pattern of racketeering activity," and reversal therefore would be mandated. (87a-88a).

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This case presents two distinct issues with respect to the RICO statute, both of which merit review by this Court. First, it raises an issue as to the proper definition of the "pattern of racketeering" element of the RICO offense. The court of appeals' *in banc* decision on this elusive question is at odds with the decisions of several other circuits, and it is clear that petitioner could not have been convicted in a majority of the nation's circuits. Moreover, the case presents a perfect vehicle to resolve this important question, and, as we discuss below, the Court already has expressed its interest in the issue by virtue of its grant of review in a similar civil RICO case, which is now

sub judice. Second, this case raises an important question as to the proper interpretation of the RICO conspiracy offense, particularly in the limitations context, which the Court has not yet had occasion to address. The facts of petitioner's case present an ideal vehicle for review of the Second Circuit's decision on this issue, which was at odds with prior rulings of this Court and has the potential virtually to eliminate the protections of the statute of limitations as it applies to the RICO conspiracy offense. We discuss each issue separately below.

II. CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS AMONG THE CIRCUITS CONCERNING THE INTERPRETATION OF THE RICO PATTERN REQUIREMENT, AND BECAUSE THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR REVIEW OF THIS IMPORTANT ISSUE

The in banc opinion of the court of appeals in this case explicitly acknowledged that the RICO pattern issue is one on which the courts of appeals have been utterly unable to agree, and the circuits are split in several distinct groups. Review in this case would enable this Court to resolve this conflict.

The RICO statute defines a "pattern of racketeering activity" as follows:

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of

racketeering activity; . . . .

18 U.S.C. § 1961(5). Participation in a "pattern of racketeering activity" is an essential element of the substantive RICO offense, 18 U.S.C. § 1962(c), and perforce an agreement to participate in a RICO pattern is an element of the offense of RICO conspiracy, 18 U.S.C. § 1962(d).[1]

The vast majority of cases interpreting this ambiguous definitional provision have followed in the wake of this Court's decision in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). In Sedima, the Court in dicta criticized the lower federal

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[1] We recognize that, because the court of appeals held that Indelicato's substantive RICO conviction was time-barred, the pattern issue relating to that count is not before this Court. The RICO conspiracy conviction, however, remains standing, and presents the same question with respect to the pattern Indelicato allegedly agreed to commit.

courts for their failure "to develop a meaningful concept of 'pattern.'" Id. at 500. In a footnote, the Court suggested that a defendant's mere commission of two predicate acts might not constitute a "pattern," and cited excerpts from RICO's legislative history indicating that racketeering acts had to be both "continuous" and "related" in order to form a "pattern." Id. at 496 n.14.

In attempting to give meaning to the essential factors of "continuity plus relationship" identified by the Sedima Court, the courts of appeals have adopted a number of divergent approaches. As noted by Judge Bright in dissent below, the Eighth Circuit has articulated a rule that racketeering acts undertaken in the course of the same criminal scheme do not amount

to a "pattern." See, e.g., Superior Oil Co. v. Fulmer, supra, 785 F.2d at 257. In fact, this Court currently has sub judice a civil case in which a complaint was dismissed for failure to meet this "multiple scheme" requirement. H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S. Ct. 1219 (1988), Dkt. No. 87-1252 (argued November 8, 1988).

Other circuits have eschewed the Eighth Circuit's rule in favor of a case-by-case, multi-factor analysis. The leading proponent of this approach is the Seventh Circuit, and the leading case in that circuit is Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986). In that case, taking what it called "a middle course," id. at 975, the court laid down the

following rule:

> In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., "transactions 'somewhat separated in time and place.'" . . . Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.

804 F.2d at 975 (quoting Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (quoting United States v. Moeller, 402 F. Supp. 49, 57-58 (D.Conn. 1975)). This approach, or substantially similar variations of it, has commanded support in a number of the other courts of appeals. All of these circuits agree that a RICO

pattern requires ongoing, continuous criminal activity consisting of racketeering acts separated in time and place. See, e.g., Bartichek v. Fidelity Union Bank, 832 F.2d 36, 40 (3d. Cir. 1987) (question to be determined is "when unlawful activity is sufficiently extensive to be 'continuous'"); Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987) (focusing on whether there was a "continuous engagement in criminal conduct"); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928-29 & n.3 (10th Cir. 1987) (holding that crimes intended to achieve "a single discrete objective" not sufficiently "continuous" to constitute a pattern); see also Sun Savings & Loan Association v. Dierdorff, 825 F.2d 187, 192-93 (9th Cir.

1987) (holding that RICO pattern requires acts "separated in time").

Still other circuits have adhered to the view that proof of any two racketeering acts will suffice to establish a pattern. Thus, the Eleventh Circuit in United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985), cert. denied, 106 S. Ct. 879 (1986), held that the attempted murder of three individuals in one shooting episode could constitute a RICO pattern, regardless of the temporal proximity of the acts. The Watchmaker decision, which preceded Sedima, apparently has been reaffirmed even in the wake of that decision. See, e.g., United States v. Hobson, 825 F.2d 364, 366 n.2 (11th Cir. 1987). The Sixth Circuit also has indicated in dicta that two racketeering acts, without more, can

constitute a RICO pattern. See United States v. Jennings, 842 F.2d. 159, 163 (6th Cir. 1988).

The Second Circuit's in banc decision in this case apparently adds yet another voice to this judicial discord. While the court's multi-factor analysis is similar to the "middle course" exemplified by Morgan v. Bank of Waukegan, supra, the court's treatment of the "continuity" requirement differs from virtually all of the courts that have addressed the issue. All of the circuits that have given independent meaning to the pattern element have held that "continuity" requires, if not discrete criminal episodes, at least some proof of racketeering acts separated in time. Under any of these approaches, we submit, Indelicato's conduct would not be deemed

sufficient to constitute a pattern. Indeed, the conflict in this case is particularly stark, as Judge Bright's dissent explicitly states that Indelicato's convictions would have been vacated in their entirety were his case in the Eighth Circuit. (88a).

Plainly, the disarray in the circuits on this issue is such that this Court's attention is eminently warranted. Moreover, this case presents a perfect vehicle for the Court to rule on the proper meaning to be given to the "continuity" and "relatedness" elements of the pattern requirement. As noted above, the "pattern of racketeering" that Indelicato was alleged and proved to have agreed to commit and committed took place within a matter of seconds and was part of a single, isolated

criminal episode; he was not named in any other predicate acts. Thus, this case raises the "continuity" issue in its purest form, involving simultaneous racketeering acts.

Beyond this, however, certiorari in this case also would allow the Court to correct the Second Circuit's ruling, which we submit is against the clear weight of authority, and simply wrong. While the various other courts of appeals have struggled to define a "pattern of racketeering activity" since Sedima, virtually all have recognized that a pattern must in some sense consist of continuing criminal conduct. Of course, the acts charged against Indelicato are the very antithesis of "continuous" criminal conduct. Nonetheless, the court of appeals

held that his simultaneous acts could properly be deemed a pattern, based on its conclusion that his acts, though isolated (and unrepeated), posed a "threat" of continuing criminal conduct.

More problematic is the reasoning by which the court concluded that such a "threat" existed. At bottom, the court's conclusion was based on the fact that Indelicato acted at the behest of an enterprise that was an "organized criminal group" -- the Commission. The plain implication of the court's opinion is that, had Indelicato instead acted at the behest of, for instance, a corporation such as General Motors, his conduct would not have constituted a pattern. This approach makes no sense, for a number of reasons. First, all RICO enterprises under Section 1962(c)

are to some extent "criminal," since by definition their affairs are being conducted through a pattern of racketeering activity. More importantly, the statutory definition of "enterprise," set out in 18 U.S.C. § 1961(4), draws no distinction between "legitimate" and "criminal" enterprises. Indeed, in United States v. Turkette, 452 U.S. 576 (1981), one of this Court's first RICO decisions, the issue before the Court was whether an enterprise with a solely illegitimate purpose was even within the sweep of the RICO statute. The Second Circuit's test raises the distinct possibility of an invidious double standard in "pattern" decisions.

Finally, the RICO pattern question is plainly important, and the Court already has expressed its interest in the issue by

virtue of its decision to review H.J. Inc. That case arose under the civil damage provisions of the RICO statute, see 18 U.S.C. § 1964(c), and to our knowledge the Court has not yet granted review in a criminal case raising RICO pattern issues. As noted above, this case presents the Court with an appropriate context in which to consider the issue, and therefore we respectfully submit that a writ of certiorari should issue to allow the Court to review the holding of the Second Circuit on this important question.

We recognize that, depending on the scope of the Court's ruling in H.J. Inc., which in all likelihood will be decided before this petition is acted upon, the pattern issue raised in this case may be disposed of or substantially affected by that

decision. In that event, we intend to file a supplemental brief pursuant to Supreme Court Rule 22.6 addressing the applicability of the decision in H.J. Inc. to this case.

III. CERTIORARI SHOULD BE GRANTED SO THAT THE COURT CAN RULE ON THE PROPER INTERPRETATION OF THE RICO CONSPIRACY OFFENSE, AND BECAUSE THE LOWER COURT'S DECISION IS AT ODDS WITH SETTLED LIMITATIONS PRINCIPLES AND PRESENTS GRAVE POTENTIAL FOR LIMITLESS EXPANSION OF CRIMINAL LIABILITY FOR RICO CONSPIRACY

Putting aside the issue of the correct definition of the RICO pattern requirement, this case raises an important question concerning the proper interpretation of the RICO conspiracy offense, particularly in the limitations context, that also merits this Court's attention. The court of appeals affirmed Indelicato's RICO

conspiracy conviction based on its conclusion that the charged RICO enterprise -- the Commission -- continued to function into the five-year limitations period, and that there was no evidence indicating that Indelicato had withdrawn from the overarching RICO conspiracy. Its decision, like the decision in United States v. Persico, supra, which it explicitly followed, turned on its analogy of the RICO conspiracy offense to other conspiracy offenses that do not require proof of an overt act.[2] The usual rule governing such conspiracies is that the offense terminates for limitations purposes when its

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[2] The courts of appeals are in general agreement that the RICO conspiracy offense does not require proof of an overt act. See, e.g., United States v. Angiulo, 847 F.2d 956, 964 (1st Cir.) (citing cases), cert. denied, 109 S. Ct. 314 (1986).

objectives have been either accomplished or abandoned. See, e.g., United States v. Grammatikos, 633 F.2d 1013, 1023 (2d Cir. 1980). The majority in this case, and the Persico majority, characterized the RICO conspiracy offense as a "conspiracy to participate in a charged enterprise's affairs, not [a] conspiracy to commit predicate acts," and held that the agreement lasted so long as there was a conspiracy to conduct the affairs of the charged enterprise. On this basis, the court held that Indelicato could be convicted of RICO conspiracy even absent any proof that he committed any predicate acts within the limitations period, or entered into a conspiracy to do so that lasted into the limitations period.

This Court has never had occasion to

speak on the attributes of the RICO conspiracy offense, and we submit that this is an appropriate case for such a clarification, principally because the Second Circuit's analysis of the offense, at least for limitations purposes, was, in our view, simply wrong. The conspiracy prohibited by the statute is not, as the court held, simply an agreement to participate in the affairs of a racketeering enterprise. Rather, what the statute prohibits is an agreement to participate in the affairs of a racketeering enterprise through a pattern of racketeering activity. In this respect, the RICO conspiracy offense differs from other conspiracy statutes that require proof only of a general agreement to engage in criminal conduct. Moreover, the court's

decision ignored the settled principle of conspiracy law that the scope of a defendant's agreement must be determined individually from the proof as it relates to him. See United States v. Borelli, 336 F.2d 376, 385, cert. denied, 379 U.S. 960 (1965). In this case, the proof showed unequivocally that the only Commission-related racketeering activity in which Indelicato agreed to engage was the three murders, and this agreement was accomplished as of July 12, 1979, well before the onset of the limitations period.

The court of appeals' decision on this issue also runs afoul of this Court's observation in Bridges v. United States, 346 U.S. 209, 223 (1953), that "[a] charge of conspiracy to commit a certain substantive offense is not entitled to a

longer statute of limitation than the charge of committing the offense itself." Indeed, as Judge Newman observed in his dissent in Persico, the rule of decision adopted by the court of appeals yields an "extremely anomalous" result. 832 F.2d at 721. Here, Indelicato committed the RICO substantive offense when he committed the Galante murders on behalf of the Commission, and his conviction for that offense has been reversed as time-barred because those acts occurred more than five years before his indictment. He committed the RICO conspiracy offense when he agreed to commit the murders on the Commission's behalf. The agreement to commit those murders obviously predated the murders themselves, and was fully accomplished when the murders were carried out. Thus, there

was no agreement to commit any racketeering act within the limitations period. Yet, Indelicato's RICO conspiracy conviction was affirmed as timely. As Judge Newman observed, it defies simple common sense that the criminal law should deal more harshly with a defendant who agrees to commit a particular act than with a defendant who actually commits the act.

The result reached in this case is particularly anomalous in light of the Second Circuit's definition of the RICO conspiracy offense, which differs from that of several other circuits. The Second Circuit has held that a RICO conspiracy is an agreement to participate in the affairs of an enterprise through a pattern of racketeering acts that the defendant personally commits or conspires to commit.

See, e.g., United States v. Teitler, 802 F.2d 606, 612-14 (2d Cir. 1986); United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984). The First Circuit has adopted the same rule. See, e.g., United States v. Winter, 633 F. 2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983). By contrast, several other circuits have expressly declined to adopt this requirement of personal action, or personal agreement to act. See generally United States v. Neapolitan, 791 F.2d 489, 494-96 (7th Cir.) (citing cases from Third, Sixth, Ninth and Eleventh Circuits), cert. denied, 107 S. Ct. 422 (1986). These courts require only proof of an agreement that members of the conspiracy commit predicate acts. The circuits thus are plainly split as to the

meaning of this important and increasingly-invoked statutory provision, and review in this case would present the Court with an opportunity to reconcile the conflict.

Finally, review is appropriate here because the effect of the approach adopted by the court of appeals is virtually to repeal the statue of limitations in RICO conspiracy cases -- an alarming prospect, given the already expansive scope of the RICO statute. The RICO statute permits the government to bring indictments naming large numbers of defendants in multitudes of distinct criminal schemes that formerly were brought as separate criminal cases. These disparate defendants and crimes are joined together under the umbrella of an alleged RICO "enterprise," which often is a sprawling entity alleged to have existed

for decades, and with no apparent termination point. Indeed, the indictment in this case alleged a RICO enterprise dating back to 1931. This practice is reinforced by the prosecution's inevitable reliance on the general rule that a conspirator's involvement in the conspiracy is presumed to continue in the absence of contrary proof, Hyde v. United States, 225 U.S. 347, 369-70 (1912). As a practical matter, therefore, a RICO conspirator may never take advantage of the policy of repose that underlies the statute of limitations. Indeed, under the limitations rule as articulated in Persico and applied in this case, Indelicato would have been equally subject to prosecution if the murders had occurred in 1939, as opposed to 1979.

Such a result, we submit, is both illogical and pernicious. As Judge Bright pointed out in dissent in this case, the RICO statute "is loosely worded and contains almost limitless potential for expansive interpretation." (89a) The court of appeals' approach to limitations exacerbates that potential abuse by exposing defendants to conviction based entirely on acts committed by others within the statutory period. Indeed, these acts need not even have been committed with the agreement or knowledge of the defendant whose case is at issue, so long as they are done on behalf of the RICO enterprise he once agreed to further. This rule effectively eliminates any statute of limitations for the RICO conspiracy offense, and should not be permitted to

stand. A writ of certiorari therefore also should issue to review the mistaken holding of the Second Circuit on this important issue.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK F. POMERANTZ
Attorney for Petitioner
Anthony Indelicato
757 Third Avenue
New York, New York 10017
(212) 593-7100

DAVID T. GRUDBERG
- Of Counsel -

APPENDICES

Appendix A
Sua Sponte Order of United States Court of Appeals Directing Rehearing *In Banc* on "RICO Pattern" Issue

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the First day of April, one thousand nine hundred and eighty-eight.

Filed: April 1, 1988

87-1085
87-1215

UNITED STATES OF AMERICA,

Appellee,

- against -

ANTHONY INDELICATO,

Appellant.

A request for an in banc vote having been made by one of the active judges, and a poll of the judges in regular active service having been taken, a majority of the court has voted to rehear in banc the appeal of Anthony Indelicato, limited to the issue discussed in Point II of his brief and Point VI of the government's brief filed with the panel that originally heard the appeal.

The parties are hereby directed that additional briefs to the in banc court shall be filed by the dates set forth below:

Appendix A

Sua Sponte *Order of United States Court of Appeals Directing Rehearing* In Banc *on "RICO Pattern" Issue*

Appellant's brief	May 2, 1988
Appellee's brief	June 1, 1988
Appellant's reply brief	June 8, 1988

A further order will be issued relating to the date and time of argument, which will take place in the Courtroom of the United States Court of Appeals for the Second Circuit.

The in banc court will consist of the members of this court in regular active service.

/s/ _____

WILFRED FEINBERG
Chief Judge

Appendix B
In Banc Opinion of United States Court of Appeals on "RICO Pattern" Issue

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 98, 106—August Term, 1987

(Argued: June 13, 1988 Decided: January 13, 1989)

Docket Nos. 87-1085, -1215
(87-1075 L)

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY INDELICATO,

Defendant-Appellant.

Before:

OAKES, *Chief Judge*,*
FEINBERG,* MESKILL, NEWMAN, KEARSE,
CARDAMONE, PIERCE, WINTER, PRATT, MINER,
ALTIMARI, and MAHONEY, *Circuit Judges*.

* Judge Oakes succeeded Judge Feinberg as Chief Judge while this matter was sub judice.

Appendix B
In Banc *Opinion of United States Court of Appeals on "RICO Pattern" Issue*

En banc rehearing on appeal from judgment of conviction entered in the United States District Court for the Southern District of New York, Richard Owen, *Judge*, convicting defendant of participating and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. §§ 1962(c) and (d).

Held: proof that defendant participated in commission of three nearly simultaneous murders at behest of organized crime group sufficed to establish RICO "pattern." Matter remanded to panel for further proceedings consistent herewith.

Chief Judge Oakes concurs in a separate opinion, joined by Judge Feinberg. Judge Mahoney concurs in a separate opinion.

JOHN F. SAVARESE, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Aaron Marcu, John Gilmore Childers, Assistant United States Attorneys, Michael Chertoff, Special Assistant United States Attorney, New York, New York, on the brief), *for Appellee*.

MARK F. POMERANTZ, New York, New York (Ronald P. Fischetti, Warren L. Feldman, David T. Grudberg, Fischetti & Pomerantz, New York, New York, on the brief), *for Defendant-Appellant*.

Appendix B
In Banc *Opinion of United States Court of Appeals on "RICO Pattern" Issue*

GERALD B. LEFCOURT, P.C. (Gerald B. Lefcourt, Joshua L. Dratel, New York, New York, Walter P. Loughlin, Newark, New Jersey, of counsel), *for Amicus Curiae Marvin Kaplan*.

KEARSE, *Circuit Judge*:

Defendant Anthony Indelicato has appealed from a judgment entered in the United States District Court for the Southern District of New York, after a jury trial before Richard Owen, *Judge*, convicting him of participating and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. (1982 & Supp. IV 1986). He was sentenced to two consecutive 20-year terms of incarceration and a $50,000 fine. His appeal and the appeals of his codefendants were heard by a panel of this Court and remain pending before that panel. We granted this rehearing *en banc* in order to consider the limited question of whether Indelicato's participation in three murders as part of a single criminal transaction could constitute a "pattern of racketeering activity" within the meaning of RICO, 18 U.S.C. § 1961(5). For the reasons below, we answer that question in the affirmative, and we remand the matter to the panel for further proceedings consistent with this holding.

I. BACKGROUND

Indelicato was charged in two counts of a 25-count superseding indictment charging him and seven codefend-

ants with various crimes arising out of operations of an organization known as the "Commission" of La Cosa Nostra, which was alleged to be the ruling body of the La Cosa Nostra organized crime families throughout the United States. The Commission was alleged to be a RICO enterprise, and Indelicato was charged with one count of participating in, and one count of conspiring to participate in, the affairs of the Commission through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and (d), respectively.

To the extent pertinent to the question considered in this *en banc* rehearing, the evidence at trial, taken in the light most favorable to the government, revealed the following. The Commission had existed for decades as the governing body of the five La Cosa Nostra families in New York City and affiliated families in other cities. Each organized crime family included a "boss" or leader, assisted by an underboss and a counselor; beneath this level were "capos" or captains, who supervised a number of people who had been made "members" or "soldiers" of the family. To be made a member of such a family, one was required to vow obedience to the rules and orders of the Commission and to be personally approved by it for admission. The functions of the Commission included overseeing interfamily ventures and intrafamily leadership disputes. The prior approval of the Commission was required before any family boss could be killed.

The Commission consisted principally of the bosses of the five organized crime families in the New York City area. During most of the 1970's, however, it did not include a representative of one such family, the Bonanno organized crime family ("Bonanno family"), because of leadership disputes within that family. During this period,

the Commission itself directly controlled the operations of the Bonanno family.

In 1979, the boss of the Bonanno family was Carmine Galante. Indelicato was a member of the family; his father was a capo; and an uncle, J.B. Indelicato, was a member. As part of an overall plan to end the factional disputes within the Bonanno family and to realign its leadership, the Commission planned and implemented the murder of Galante and two of his close associates.

In planning the murder of Galante, the Commission worked through Aniello Dellacroce, underboss of the Gambino organized crime family, Stefano Canone, the counselor of the Bonanno family, and several soldiers in the Bonanno family including Indelicato, Dominic Trinchera, and Cesare Bonventre. Thus, in May or June 1979, Trinchera introduced Indelicato to one Louis Giongetti, a lifelong felon. Indelicato asked Giongetti whether he had ever "hit," *i.e.*, killed, anyone. Giongetti assured Indelicato that he was experienced and trustworthy. In early July, Indelicato and Trinchera met in a bar with Giongetti; Trinchera sent Giongetti to a "safe house" to retrieve a cache of shotguns and other weapons.

On July 12, 1979, Indelicato and two other men, all wearing ski masks, entered a restaurant in Brooklyn, New York, where Galante, his cousin Guiseppe Turano, and Galante's friend and associate Leonard Coppola were having lunch. Using guns of the type earlier amassed at the bar, Indelicato and his two companions shot and killed Galante, Turano, and Coppola. The victims were shot numerous times at close range with several weapons. The evidence also showed that two other men, including Bonventre, who had accompanied Coppola to lunch and were

uninjured in the shootings, had joined in shooting Coppola, Turano, and Galante.

Indelicato and his two companions fled in a car stolen a month earlier. After abandoning that car, Indelicato immediately went with his father, his uncle J.B., and Phillip Giaccone, another Bonanno family capo, to a social club in Manhattan to report his success to Dellacroce and Canone. A surveillance videotape showed Indelicato being congratulated by Canone.

Thereafter, Indelicato remained involved with the Commission. He, Trinchera, and Bonventre were promoted to the rank of capo. Indelicato maintained that rank until at least 1981.

The three murders were the only RICO predicate acts alleged against Indelicato. He was not named in any of the remaining 23 counts of the indictment. The proof at trial relating to the three murders included, in addition to the above, ballistics and medical forensic evidence, eyewitness evidence, and Indelicato's palm print on an inside door handle of the getaway car. Indelicato was convicted on both of the counts against him. His appeal and the appeals of his codefendants were heard before a panel of this Court in September 1987, and those appeals remain pending.

Indelicato's principal argument on appeal is that proof of his commission of, or agreement to commit, three murders as part of a single criminal transaction is insufficient to establish a "pattern of racketeering activity" within the meaning of RICO. In April 1988, we agreed to rehear this issue *en banc*, in tandem with an *en banc* rehearing of *Beauford v. Helmsley*, 843 F.2d 103 (1988). For the reasons below, we conclude that the facts proven by the government are sufficient to establish a RICO pattern.

Appendix B
In Banc *Opinion of United States Court of Appeals on "RICO Pattern" Issue*

II. DISCUSSION

RICO § 1962(c) makes it unlawful, in pertinent part,

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

18 U.S.C. § 1962(c). Section 1962(d) makes it unlawful to conspire to violate §§ 1962(a), (b), or (c). The terms "enterprise," "racketeering activity," and "pattern of racketeering activity" are defined in 18 U.S.C. § 1961, in pertinent part, as follows:

> (1) "racketeering activity" means (A) any act or threat involving [*inter alia*] murder, kidnaping, gambling, arson, robbery, bribery, extortion, . . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 224 (relating to sports bribery), . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . section 1952 (relating to racketeering), . . . sections 2314 and 2315 (relating to interstate transportation of stolen property), . . . (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving . . . the felonious manufacture, importation, . . . or otherwise dealing in narcotic or

other dangerous drugs, punishable under any law of the United States . . . .

. . . .

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . . .

18 U.S.C. §§ 1961(1), (4), and (5).

Our assessment of Indelicato's contention that his commission of three murders as part of a single criminal episode or transaction cannot be considered a RICO "pattern" requires a review of the development of Second Circuit doctrine as to the RICO concept of pattern both before and after the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) ("*Sedima*").

A. *Early Second Circuit Interpretations of "Pattern"*

Following the enactment of RICO, few cases in this Court required us to focus closely on the meaning and content of the statutory definition of "pattern of racketeering activity." In those that did, we generally gave "pattern" a generous reading.

In *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), we considered a conviction under 18 U.S.C. § 1962(b), which makes it unlawful

to, *inter alia*, acquire an interest in or control of an enterprise through a pattern of racketeering activity. A defendant convicted of gaining control of a hotel in violation of this section contended that there was insufficient proof of the requisite number of acts of racketeering activity to constitute a pattern. We affirmed the conviction, noting that on February 4, 1971, this defendant had caused the interstate transport of stolen funds, in violation of 18 U.S.C. § 2314 (1970); that on February 4, he had caused the victim of his scheme to travel in interstate commerce to pick up two checks representing the stolen funds, also in violation of § 2314; and that on February 9, the defendant had caused the interstate transport of an additional check representing stolen funds, in violation of the same section. We concluded that a RICO pattern had been adequately proven: "Parness was charged with and convicted of three separate violations of § 2314. . . . Convictions on any two of these counts were sufficient under § 1961(5) to establish the 'pattern of racketeering activity' necessary for a conviction under § 1962(b)." 503 F.2d at 438.

Shortly thereafter, the district court in *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975), interpreting the statement that "any two" of the *Parness* acts sufficed to establish a RICO pattern as a ruling that even the very closely related acts that occurred on the same day constituted a pattern, expressed its skepticism: "While the statutory definition makes clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word 'pattern' implies acts occurring in *different criminal episodes*, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity." *Id.* at 57 (emphasis in original). On the authority of *Parness*, however, the court concluded that the kidnaping

of three employees who worked in a building, followed by arson on the building on the same day, could constitute a RICO pattern in a prosecution under § 1962(c). *Id.* at 58.

In the meantime, the district court in *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), confronted with an attack on the constitutionality of RICO as impermissibly vague, sought to give precise content to the pattern element. The court noted that 18 U.S.C. § 3575(e) (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 473, tit. II, §§ 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 2031, entitled "Increased Sentence for Dangerous Special Offenders" and enacted, like RICO, as part of the Organized Crime Control Act of 1970, specified that a "pattern of criminal conduct" exists when "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events"; it concluded that the interpretation of "pattern of racketeering activity" in RICO should be similar. Accordingly, it stated that to constitute a RICO pattern, "the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts." 409 F. Supp. at 614. This Court, in affirming the eventual judgments of conviction, was not called upon to address the district court's interpretation of the "pattern" requirement.

In *United States v. Weisman*, 624 F.2d 1118, 1123 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980), we substantially undercut *Stofsky*'s interpretation of the pattern requirement, for we rejected the defendants' contention that the

jury should have been charged that it could not find a RICO pattern on the basis of two predicate acts "unless the predicate acts were also found to be 'related' to each other through a 'common scheme, plan or motive.' " *Id.* at 1121. Weisman was convicted of a number of offenses, including nine counts of securities fraud committed in 1973, nine counts of bankruptcy fraud in connection with the financial problems of a theatre opened in 1975, and one count of participating in the affairs of an enterprise through a pattern of racketeering, in violation of § 1962(c). He contended that no RICO pattern had been proven because, *inter alia*, the securities frauds (which the trial court had charged the jury could constitute only a single predicate act because they arose "out of the same episode," *id.* at 1124 n.5) and the bankruptcy frauds were not related to each other. We rejected this contention both on the facts and in principle.

Without commenting on the trial court's "same episode" theory, we concluded that even counting the nine securities frauds as one act, the securities fraud and bankruptcy frauds were all related to the theatre and could "constitute ten separate predicate acts of racketeering, any two of which would be sufficient to sustain the conviction on the RICO count." *Id.* at 1124. Noting that if a direct relationship between the acts were required, it had been amply proven by reason of similarity of victims, goals, and methods, *id.* at 1123 n.4, we stated that "the statutory language does not expressly require that the predicate acts of racketeering be specifically 'related' to each other." *Id.* at 1122. We agreed with Weisman that RICO was not intended to apply to sporadic and unrelated criminal acts, but we concluded that where each act was related to the conduct of the affairs of a RICO enterprise, the jury was entitled to find a RICO pattern. *Id.* ("the

enterprise itself supplies a significant unifying link between the various predicate acts specified in section 1961(1) that may constitute a [RICO] 'pattern' ").

Following our *Weisman* decision, we ruled that predicate acts related to an enterprise were sufficient to support a conviction under § 1962(c) even though they were not in furtherance of the enterprise, where the defendant used his position in the enterprise to commit those acts. *See United States v. LeRoy*, 687 F.2d 610, 616-17 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); *United States v. Scotto*, 641 F.2d 47, 53-55 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). In *LeRoy*, we held that a pattern was established by proof that the defendant had committed "more than two" violations of 29 U.S.C. § 501(c) (1976) or 29 U.S.C. § 186 (1976). 687 F.2d at 617. In *Scotto*, we held that the jury was properly instructed that in order to find a RICO pattern it needed to find that the defendant had committed "two or more" of the alleged violations of § 186. 641 F.2d at 54-55.

In *United States v. Mazzei*, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983), we upheld a conviction under § 1962(c) in which the enterprise was a group of persons associated in fact who traveled in interstate commerce in order to bribe contestants in various college basketball games, and the RICO pattern was defendants' attempts to influence the outcome of those basketball games, in violation of 18 U.S.C. § 224 (1976), and their interstate travel in aid of that goal, in violation of 18 U.S.C. § 1952 (1976). Mazzei contended that no RICO violation had been shown because the alleged enterprise was indistinguishable from the alleged pattern of racketeering activity. We rejected this contention, ruling that the pattern and the enterprise need not be totally "distinct and independent, as long as

the proof offered is sufficient to satisfy both elements." 700 F.2d at 89. *See also Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 22 (2d Cir. 1983) (rejecting district court's view that plaintiff in private RICO action brought under 18 U.S.C. § 1964(c) was required to allege facts showing that the enterprise had an " 'independent economic significance from the pattern of racketeering activity' " (quoting 553 F. Supp. 1347, 1363 (S.D.N.Y. 1983))), *cert. denied*, 465 U.S. 1025 (1984).

Thus, prior to the Supreme Court's 1985 decision in *Sedima* and our interpretation of *Sedima* in *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987), this circuit had liberally construed the RICO pattern element as not requiring, in connection with § 1962(c), that the predicate acts be "specifically" related to each other, so long as they were related to the conduct of the affairs of the enterprise, and as not requiring, in connection with § 1962(b), that the predicate acts be separated in time or place or be parts of separable episodes or in furtherance of different schemes.

In the meantime, as discussed below, this Court gave more restrictive interpretations in civil RICO cases to other preconditions to recovery, which led to the Supreme Court's decision in *Sedima*.

B. Sedima*'s Footnote 14 and* Ianniello*'s Interpretation of It*

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, the Supreme Court considered for the first time the civil action provisions of RICO, reversing a decision of this Court which held that a civil action could not be maintained unless (1) the defendant had already been convicted of a predicate racketeering act or of a RICO violation, and

(2) the plaintiff could show special racketeering injury. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985); *see also Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984) (plaintiff required to show injury flowing from "pattern" rather than from individual racketeering acts), *vacated and remanded*, 473 U.S. 922 (1985). The *Sedima* Court observed that

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, see *United States v. Turkette*, 452 U.S. 576, 586-87 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947,

473 U.S. at 497-98, and it concluded that recovery in a civil RICO action did not require proof of either a prior conviction or a special type of injury.

In discussing the nature of the injury that must be shown, the Supreme Court noted that the civil RICO plaintiff must allege the defendant's "(1) conduct (2) of an enterprise (3) through a pattern[14] (4) of racketeering activity," 473 U.S. at 496, and that the statute requires no more than this, *id.* at 497. Footnote 14, which discussed the nature of the "pattern" requirement and its relationship to individual acts of racketeering activity, stated as follows:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while

> two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). . . . Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the [Organized Crime Control] Act.

Id. at 496 n.14 (emphasis in *Sedima*).

In discussing the relationship between "pattern" and "enterprise" in *United States v. Turkette*, 452 U.S. 576 (1981), the Court had stated as follows:

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> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. [§ 1961(1).] The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Id. at 583.

In *United States v. Ianniello*, 808 F.2d 184, we affirmed convictions under § 1962(c) in connection with the defendants' skimming of profits from several New York City restaurants and bars and their fraudulent procurement of liquor licenses in aid of that practice. On appeal, the defendants argued, *inter alia*, (1) that our decision in *Weisman*, 624 F.2d 1118, should be reconsidered in light of *Sedima*'s statement in footnote 14 that two acts are necessary but not sufficient to constitute a RICO pattern, and (2) that two acts of mail fraud in the procurement of liq-

uor license renewals in successive years were parts of a single scheme and thus could not, as a matter of law, constitute a pattern. We rejected both contentions.

We declined to reconsider *Weisman*, stating (a) that *Sedima* did not address *Weisman*, (b) that the *Sedima* footnote's observation that separate acts must exhibit some combination of relationship and continuity in order to constitute a pattern was not inconsistent with *Weisman*, and (c) that in any event "[b]ecause the *Sedima* footnote does not rise to the level of a holding, it is not controlling," 808 F.2d at 190. *Ianniello* therefore stated its adherence to *Weisman*, which it read as holding "that two predicate acts can suffice to satisfy the pattern requirement of RICO." *Id.* Since *Weisman* had indicated that the requisite relationship between racketeering acts could be found in the fact that each of them was related to a RICO enterprise, *Ianniello* concluded that "the inquiry as to relatedness and continuity," which *Sedima* suggested should be made in assessing whether there is a pattern, "is best addressed in the context of the concept of 'enterprise.' " *Id.* at 191.

On the facts before us in *Ianniello*, we concluded that continuity of enterprise was adequately shown:

> an enterprise with "a single purpose," here fraud continuing indefinitely, can provide the basis for a section 1962(c) violation. The common purpose in this case was to skim profits and had no obvious terminating goal or date, clearly establishing the enterprise requirement.

Id. at 191-92. We also rejected the contention that evidence of two racketeering acts in pursuit of a single unlawful goal is insufficient to prove a RICO pattern and that

establishment of more than one unlawful scheme is necessary:

> Instead, we hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied.

Id. at 192; *see also id.* n.16 ("definition of pattern requires at least two acts of racketeering activity, not two schemes").

C. *This Circuit's Post-*Ianniello *Decisions*

In the wake of *Ianniello*, the district courts of this circuit divided over whether the *Ianniello* holding that two predicate acts sufficed to satisfy the pattern requirement applied in civil RICO actions. Some held that the same rules apply in both criminal and civil RICO cases, *e.g.*, *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536, 544-45 (E.D.N.Y. 1987), while others held that *Ianniello*'s holding was limited to cases involving wholly criminal enterprises, *e.g.*, *Franklin & Joseph, Inc. v. Continental Health Industries, Inc.*, 664 F. Supp. 719, 723-24 (S.D.N.Y. 1987). *See generally Furman v. Cirrito*, 828 F.2d 898, 908-09 (2d Cir. 1987) (Pratt, *J.*, dissenting and listing cases).

In a series of appeals from dismissals of civil RICO complaints, we clarified that *Ianniello*'s ruling that two predicate acts suffice to establish a RICO pattern does apply to civil RICO actions. In addition, we added gloss to *Ianniello*'s imputation of the continuity requirement to the enterprise element.

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In *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987) ("*Beck*"), *cert. denied*, 108 S. Ct. 698 (1988), the plaintiffs brought a civil RICO action complaining that the defendant bank, an indenture trustee, had breached its fiduciary duties by fraudulently making certain interest payments, selling collateral at a reduced price, and disposing of the proceeds. As predicate acts of racketeering activity, the complaint alleged that the bank had committed numerous mail frauds, in violation of 18 U.S.C. § 1341, and wire frauds, in violation of 18 U.S.C. § 1343 (1982). The district court dismissed the complaint for, *inter alia*, failure to plead a valid RICO pattern, on the ground that the alleged racketeering acts were part of a single episode and that *Sedima*'s footnote 14 interpretation of RICO pattern required proof of "multiple episodes." We rejected this interpretation of the pattern requirement as foreclosed by *Ianniello*:

> It is clear after *Ianniello* that the District Court erred in interpreting "pattern of racketeering activity" to require multiple episodes. *Ianniello* confirms that two related predicate acts will suffice to establish a pattern under 18 U.S.C. § 1961(5). [808 F.2d] at 189-90. Plaintiffs' amended complaint pleads at least two related acts of mail and wire fraud with regard to the sale of the U.S. collateral and therefore satisfies the pleading requirement for "pattern of racketeering activity."

820 F.2d at 51.

Nonetheless, noting that, "[a]s *Ianniello* recognized, whether one looks for the requisite continuity and relatedness by examining the pattern or the enterprise is really a matter of form, not substance," *id.*, we affirmed the dismissal of the *Beck* complaint, concluding that it did not

adequately allege a RICO enterprise. We noted that "*Ianniello* emphasizes that a plaintiff must prove the existence of a *continuing* enterprise" or " '*continuing operation*' " under § 1962(c), by showing " 'an *ongoing organization*,' " and " 'evidence that the various associates function as a *continuing unit*.' " 820 F.2d at 51 (quoting *Ianniello*, 808 F.2d at 191 (quoting *Turkette*, 452 U.S. at 583)) (emphasis in *Beck*). We concluded that because the enterprise alleged by the *Beck* plaintiffs, insofar as the complaint adequately pleaded any fraud, had "had but one straightforward, short-lived goal," *i.e.*, the sale of the collateral at a reduced price, and had ceased to function at the conclusion of that sale, the alleged "association is not sufficiently continuing to constitute an 'enterprise.' " 820 F.2d at 51.

Beck was followed by *Furman v. Cirrito*, 828 F.2d 898, a lawsuit between the principals in a dissolved limited brokerage partnership that was alleged to have been a RICO enterprise. The plaintiffs alleged that they had been the victims of mail fraud in connection with the sale of partnership assets negotiated by the defendants. We affirmed the dismissal of the complaint. Contrasting the continuity requirements found in *Ianniello* and *Beck* with the complaint's allegation that the partnership had been dissolved, the *Furman* majority affirmed the dismissal on the ground that, even assuming that plaintiffs had "spelled out some form of criminal fraud on [defendants'] part, they have not alleged a pattern of racketeering activity conducted in the affairs of an 'enterprise' " that would have the requisite continuity. *Id.* at 902. The majority reasoned that although partnerships are expressly mentioned in the definition of enterprise, "since the effect of [defendants'] acts was to remove [the parties' partnership] from the very def-

inition of enterprise, the requirement of continuity was not satisfied." *Id.* at 903.

In dissent, Judge Pratt criticized both the *Furman* majority opinion and the *Beck* decision as inconsistent with *Ianniello*. The dissent disagreed with the majority's apparent view that the sale of the partnership could not be part of the conduct of the partnership's affairs, and concluded that the majority's ruling that the dissolution of the partnership eliminated the requisite continuity of enterprise had the effect of equating enterprise with racketeering activity. *Id.* at 907-08. The dissent also concluded that when *Beck* required multiple or extended goals in order to make the enterprise a continuing enterprise, it misidentified the enterprise as the activity and "undercut[ ] *Ianniello* by putting back into the RICO stew the multiple-episode ingredient that *Ianniello* sought to remove." *Id.* at 908.

In *Albany Insurance Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987), we affirmed the dismissal of a civil RICO complaint which, together with a proposed amendment, charged that the corporate defendant and its owner had committed arson and mail fraud in order to obtain payment of a false insurance claim. Noting that *Ianniello* had affirmed the convictions there at issue because the profit-skimming enterprise had " 'no obvious terminating goal or date,' " *id.* at 44 (quoting *Ianniello*, 808 F.2d at 192), and that *Beck* had affirmed the dismissal of a civil RICO complaint because of the enterprise's " 'straightforward, short-lived goal,' " 831 F.2d at 44 (quoting *Beck*, 820 F.2d at 51), we concluded that the *Albany* defendants did not constitute a sufficiently "continuing" enterprise because their activity "had an 'obvious terminating goal' " of inducing the insurer to pay a false insurance claim. 831 F.2d at 44.

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In *United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2035 (1988), we affirmed a RICO conviction under § 1962(c) in which the enterprise was a corporation formed for the purpose of manufacturing and distributing narcotics, and two of the predicate acts alleged were a conspiracy to manufacture and distribute narcotics in violation of 21 U.S.C. § 846 (1982), and a conspiracy to import one of the necessary ingredients into the United States in violation of 21 U.S.C. § 963. Carmine Loiacono, the defendant thus convicted, contended that the two conspiracies could not be deemed separate acts of racketeering activity because they were part of the single overall narcotics scheme. We disagreed. Noting that the differences between the two conspiratorial offenses meant that a defendant could be held guilty of either, neither, or both, we concluded that

> [t]he fact that Loiacono committed both crimes as part of a single plan does not invalidate the RICO conviction, since this circuit has rejected the view that a pattern of racketeering activity or a racketeering enterprise must consist of multiple ventures or plans. So long as the defendants commit at least two predicate acts, they have met the pattern requirement and, so long as the enterprise is long and elaborate enough to be considered continuing, the enterprise requirement is satisfied.

836 F.2d at 72 (citing *Beck* and *Ianniello*).

In *Creative Bath Products, Inc. v. Connecticut General Life Insurance Co.*, 837 F.2d 561 (2d Cir. 1988), we considered a complaint by two related companies and their two principals alleging that the defendants had made three misrepresentations in the sale to the companies of four insurance policies on the lives of the companies' princi-

pals. The district court had dismissed for insufficient allegation of a RICO pattern. We noted that this was "probably" error in light of *Ianniello*; but we affirmed the dismissal on the ground that the complaint failed to show the requisite continuity of enterprise:

> [P]laintiffs' case consisted of the proposition that defendants had made three fraudulent representations in pursuit of a single short-lived goal, *i.e.*, the sale to Creative Bath and its affiliated company of the four insurance policies on the lives of the two partners. That RICO claim is not distinguishable in a meaningful way from those claims whose dismissals were upheld in *Beck* and *Albany*. Accordingly, we affirm the judgment of dismissal.

Id. at 564.

Finally, in *Beauford v. Helmsley*, 843 F.2d 103, which was reheard *en banc* with the present case, we affirmed the dismissal of a civil RICO complaint alleging that the defendants had committed mail fraud in connection with offering for sale 8,286 apartments that were being converted into condominiums. The alleged racketeering activity was said to be the mailing of fraudulent offering plans to the tenants of the apartments, as well as to others, and the later mailing of plan amendments to those persons. We stated that our precedents were confusing but seemed to require the conclusion that "a single alleged scheme to defraud buyers, tenants, and the authorities overseeing the laws pertaining to" the conversion is not sufficient to allege a RICO enterprise "regardless of how many fraudulent acts it entails." We concluded that the *Beauford* complaint was properly dismissed for lack of a RICO enterprise because the scheme, though "widespread," was

"discrete," and, though "continuing," was "finite." *Id.* at 110.

D. *Other Circuits' Interpretations of "Pattern" and "Enterprise"*

Other circuits have dealt with *Sedima*'s footnote 14 and the requirements of relationship and continuity in other ways. None has interpreted "enterprise" in the way we have; all have remained focused on "pattern."

The Eighth Circuit has adopted the view that a civil RICO plaintiff cannot establish a RICO pattern merely by showing that the defendant has committed a number of racketeering acts pursuant to a single scheme. Rather, he must show that the defendant has engaged in more than one scheme. *E.g.*, *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986).

The Seventh Circuit has adopted a standard that requires neither multiple schemes nor a continuing enterprise but does appear to require that the predicate acts have occurred in separate transactions. In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the court considered a claim that the defendants had defrauded the plaintiff investors over a period of some four years through mail fraud in connection with a loan transaction and two separate foreclosures. The court considered the acts to be part of a single grand scheme but to have sufficient continuity to constitute a RICO pattern because they were "ongoing over an identified period of time so that they [could] fairly be viewed as constituting separate transactions, *i.e.*, 'transactions "somewhat separated in time and place." ' " *Id.* at 975 (quoting *Graham v. Slaughter*,

624 F. Supp. 222, 225 (N.D. Ill. 1985) (quoting *United States v. Moeller*, 402 F. Supp. at 57)). The *Morgan* court also noted its adherence to *Lipin Enterprises v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986), which had held that "multiple predicate acts" over the course of several months did not satisfy the continuity aspect of the RICO pattern requirement because the acts were in furtherance of a single scheme to acquire a single large block of stock from a single victim and hence resulted in only a single injury. *See* 804 F.2d at 976-77.

In contrast, the Eleventh Circuit ruled that a series of predicate acts related to one fraudulent scheme or criminal episode can constitute a pattern, stating that the standard of that circuit is that each act is a separate predicate act for pattern purposes if it constitutes a separate violation of federal or state law listed in § 1961(1) " 'irrespective of the circumstances under which [the acts] arose.' " *Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (quoting *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986)). In *Watchmaker*, the court held that three simultaneous shootings constituting attempted murders, committed in the conduct of the affairs of an enterprise whose business was crime, could constitute a RICO pattern.

A number of other circuits have proceeded without enunciating a precise test. *See, e.g., United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988) (stating obiter that two acts charged as part of a single count of an indictment may constitute the predicate acts needed to support a RICO conviction); *United States v. Licavoli*, 725 F.2d 1040, 1047 (6th Cir.) (murder and conspiracy to commit that murder may constitute the requisite predicate acts),

cert. denied, 467 U.S. 1252 (1984); *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987) (series of acts that were part of single scheme constituted a RICO pattern because they posed threat of continuing activity); *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987) (several acts of mail and wire fraud in furtherance of a single isolated bribe (paid in three installments) did not constitute a pattern); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987) (single limited scheme found not sufficient); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (two related acts of mail fraud would suffice to satisfy pattern requirement). *See generally* Abrams, *Civil RICO's Cause of Action: The Landscape After* Sedima, 12 Tul. Mar. L.J. 19, 41-51 (1988).

E. *"Pattern" and "Enterprise" Revisited*

It is in this posture that today's *en banc* issue arises. This circuit, alone among all the circuits, has held that a RICO pattern of racketeering activity may be established simply by proof of two acts of racketeering activity, but that a RICO enterprise is not established unless there is proof that it is ongoing and that there is more than a single scheme having no demonstrable ending point. For the reasons below, we conclude today that proof of two acts of racketeering activity without more does not suffice to establish a RICO pattern; that the concepts of relatedness and continuity are attributes of activity, not of a RICO enterprise, and that a RICO pattern may not be established without some showing that the racketeering acts are interrelated and that there is continuity or a threat of continuity; that a pattern may be established without proof of multiple schemes, multiple episodes, or multiple transactions; and that racketeering acts that are not widely sepa-

rated in time or space may nonetheless, given other evidence of the threat of continuity, constitute a RICO pattern.

To begin with, we note that though we disagree with the doctrinal treatment that followed, *Ianniello* correctly characterized *Sedima*'s footnote 14 as dictum. The Supreme Court was not presented with an issue as to whether or not a RICO pattern had been established but only with whether RICO required (a) a prior conviction or (b) some special type of injury. The holding of the Supreme Court was that neither of these conditions was a prerequisite to recovery in a civil RICO action. Since the nature of the pattern to be shown was not then in issue, we agree with *Ianniello* that footnote 14 was dictum.

Nonetheless, the *Sedima* dictum was entitled to far greater deference than *Ianniello* gave it. Moreover, the language of the statute and the legislative history support the essential point of that dictum. There is no question that, technically, the language of the statutory definition of "pattern of racketeering activity" does not define but merely sets a minimum. That is, in contrast to certain other RICO definitions, which use the term "means," *see, e.g.*, § 1961(1), the definition of pattern "requires" at least two racketeering acts, implying, as *Sedima*'s footnote observed, that while two acts are necessary, they may not be sufficient.

The legislative history supports this inference, both explicitly and implicitly. Earlier proposed definitions of pattern were more susceptible to an interpretation that two racketeering acts, without more, would suffice. As revealed in the Senate Report on S. 30, which contained RICO as enacted, an earlier bill, S. 1861, would have defined the term as follows: "The term 'pattern of racke-

teering activity' *includes* at least *one* act occurring after the effective date of this chapter." S. Rep. No. 617, 91st Cong., 2d Sess. 122 (1969) ("S. Rep. 617") (emphasis added). The Department of Justice, responding to a request for comments on S. 1861, proposed a modification to clarify that "[t]he term 'pattern' indicate[d] that what [was] intended to be proscribed is not a single, isolated act of 'racketeering activity,' but at least two such acts." *Id.* The new proposed definition was: "The term 'pattern of racketeering activity' *means* at least two acts, one of which occurred after the effective date of this chapter." *Id.* (emphasis added). The Senate rejected the proposed modification, however, in favor of the version enacted in § 1961(5). *See id.* at 158. Thus, the evolution of the present definition ended with the substitution of "requires at least two" for "means at least two." This history amply supported the floor statement of Senator McClellan, sponsor of S. 30, that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970).

The legislative history is thus inconsistent with a rule that any two acts of racketeering activity, without more, suffice to establish a RICO pattern. Accordingly, we abandon the *Ianniello* view that two acts, without more, suffice.

We note in passing that we do not believe *Weisman* stood for the proposition that two acts of racketeering activity sufficed without more to establish a pattern. While it might have stood for that proposition if only two acts of racketeering activity had been proven, in fact at least 10 (and perhaps as many as 18) racketeering acts had been proven, and *Weisman*'s statement that any two of the proven offenses sufficed to show a pattern must be inter-

preted against that background. It was plain that no two of these acts could be viewed as isolated or sporadic, for there were at least eight other similar acts.

Further, we no longer adhere to the view of *Ianniello* and its progeny that relationship and continuity are necessary characteristics of a RICO enterprise. Neither the statutory definition of enterprise nor the legislative history suggests that those concepts pertain to the notion of enterprise. Rather, the language and the history suggest that Congress sought to define that term as broadly as possible, "includ[ing]" within it every kind of legal entity and any "group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). To the extent that the legislative history discusses the concepts of relatedness and continuity, it does so in connection with proposed definitions of pattern of racketeering activity. *See* S. Rep. 617, at 158 ("The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."); 116 Cong. Rec. 18940 (1970) (Statement of Sen. McClellan: "The term 'pattern' . . . requires the showing of a relationship . . . ."). We conclude that relatedness and continuity are essentially characteristics of activity rather than of enterprise.

An interrelationship between acts, suggesting the existence of a pattern, may be established in a number of ways. These include proof of their temporal proximity, or common goals, or similarity of methods, or repetitions. The degree to which these factors establish a pattern may depend on the degree of proximity, or any similarities in goals or methodology, or the number of repetitions. Con-

gress's elaboration on the concept of pattern in connection with its provision in 18 U.S.C. §3575(e) for dangerous special offenders is instructive. As discussed in *Sedima*'s footnote 14, that section provided that criminal conduct would form a pattern if it embraced criminal acts that had, for example, "the same or similar purposes, results, participants, victims, or methods of commission." 18 U.S.C. § 3575(e) (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 473, tit. II, §§ 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 2031. Though the facts (a) that this section was part of the legislation that included RICO, and (b) that Congress did not include a similar elaboration as part of RICO, suggest that Congress did not intend the same definition to be engrafted onto RICO, these characteristics plainly are not irrelevant to proof of pattern. Though continuity and relatedness could be shown in other ways even if each of the listed similarities was lacking, we think the presence of any of these similarities could well justify a conclusion that the acts were related. *See generally* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009, 1030 & nn.97-101 (1980) ("Blakey & Gettings").

We recognize that to the extent relatedness is to be shown by the acts' temporal proximity, there may well be a tension between relatedness and continuity, for obviously the shorter the elapsed time between the two acts, the less it can be said that the activity is continuing. Nonetheless, "[i]t is important to recognize that in footnote 14 the Supreme Court does not enshrine 'continuity plus relationship' as a determinative two-pronged test. Rather, the Court quotes this language to demonstrate how the pattern requirement should be interpreted to prevent the application of RICO to the perpetrators of 'isolated' or

'sporadic' criminal acts." *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d at 192. Further, we note that the legislative history referred not just to continuity but also to the *threat* of continuity. Therefore, where the virtual simultaneity of two acts suggests that they are related, the timing does not negate the existence of a pattern; rather, evidence of continuity or the threat of continuity will simply have to come from facts external to those two acts.

We do not agree with those courts that have in effect concluded that temporal proximity requires that two or more acts be counted as one. While temporal separation of events is a common feature of a pattern of action, it is not an essential; such a pattern may be found, for example, in the simultaneous commission of like acts for similar purposes against a number of victims.

Nor, with respect to the requirement of continuity or threat of continuity, do we see any basis in RICO or its legislative history for the proposition that a RICO violation cannot be established without proof of more than one scheme, episode, or transaction, or without proof that the scheme pursuant to which the racketeering acts were performed is a scheme with no apparent termination date. The statute defines racketeering activity in terms of criminal "acts," *see* §§ 1961(1)(A), (B), (C), and (E), or "offenses," *see* § 1961(1)(D); it similarly defines pattern in terms of "acts" of racketeering activity, *see* § 1961(5). There is no mention of schemes, episodes, or transactions. We doubt that Congress meant to exclude from the reach of RICO multiple acts of racketeering simply because they achieve their objective quickly or because they further but a single scheme. We note also that this view is consistent with our ruling in *United States v. Parness*, 503 F.2d 430. Indeed, though the *Ianniello* panel, in discussing enter-

prise, described the record before it as showing "fraud continuing indefinitely" with "no obvious terminating goal or date," 808 F.2d at 191-92, we regard that reference as simply a description of some of the indicia of continuity in that case rather than a suggestion that proof of a scheme of indefinite duration would be required in every case.

In sum, though we would disapprove any attempt by the government or a private plaintiff to go beyond Congress's intent and fragment an act that plainly is unitary into multiple acts in order to invoke RICO, we conclude that where in fact there are a number of different acts, each should be separately counted. If there are similarities between them with respect to victim, methodology, goal, *etc.*, and if there is evidence of a threat of continuation of racketeering activity, we conclude that the acts may constitute a pattern even though they are nearly simultaneous.

In some cases both the relatedness and the continuity necessary to show a RICO pattern may be proven through the nature of the RICO enterprise. For example, two racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise. The nature of the enterprise may also serve to show the threat of continuing activity. Where the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity. Even where the enterprise is legitimate, if the racketeering acts were performed at the behest of an organized crime group, that fact would tend to belie any notion that the racketeering acts were sporadic or isolated. We do not suggest that a defendant's association with an organized crime group is itself an act of racketeering activ-

ity, or that the defendant is to be held accountable for the racketeering acts of others. We simply note that such an association may reveal the threat of continued racketeering activity and thereby help to establish that the defendant's own acts constitute a pattern within the meaning of RICO.

Finally, we note that though the interrelatedness concept discussed above pertains to the predicate acts, it is plain that for establishment of a RICO violation there must also be some kind of relationship between the acts and the enterprise, for each of the substantive RICO subsections prohibits a specific type of interplay between a pattern of racketeering activity and the enterprise. Section 1962(a) prohibits use of income derived from a pattern of racketeering activity for the establishment of, or acquisition of an interest in, an enterprise engaged in or affecting interstate or foreign commerce. Section 1962(b) prohibits use of a pattern of racketeering activity to acquire an interest in, or control of, such an enterprise. And § 1962(c) prohibits use of a pattern of racketeering activity in the conduct of such an enterprise's affairs. Thus, no RICO violation can be shown unless there is proof of the specified relationship between the racketeering acts and the RICO enterprise. To the extent, therefore, that the relationship between acts necessary to establish a pattern depends on the relationships between individual acts and the enterprise, there will often be some overlap of proof and analysis. The degree of overlap will vary depending in part on the substantive RICO subsection at issue. The establishment of a subsection (a) violation, for example, will likely entail less overlap, since the acts by which the tainted income is acquired need have no logical relationship to the enterprise in which investment will thereafter be made. In contrast, establishment of a subsection (c)

violation will often entail overlap, for each act of racketeering activity will be related to the enterprise since the latter's affairs are by hypothesis conducted through a pattern of such acts. The differences and overlap are simply a consequence of Congress's use of the same defined terms in fashioning different substantive prohibitions.

This is not to say that one should ever view the enterprise and the pattern as the same thing, for they are not. "[T]he concept 'enterprise' focuses on a group of people; . . . . The concept 'pattern' focuses on the relationship between acts of racketeering . . . ." Blakey & Gettings at 1026 n.91. But the difference in the nature of the two elements does not mean that the same piece of evidence may not help to establish both. *See Turkette*, 452 U.S. at 583 ("the proof used to establish these separate elements may in particular cases coalesce"); *Moss v. Morgan Stanley*, 719 F.2d at 22-23; *United States v. Mazzei*, 700 F.2d at 89-90. We conclude that evidence of the nature of the enterprise may be used to show the threat of continuity sufficient to establish a RICO pattern.

F. *Application of These Principles to Indelicato*

Under these standards, we have little difficulty in concluding that Indelicato's participation in the three Bonanno family murders as a representative of the Commission constituted a pattern of racketeering activity within the meaning of RICO. There were three persons targeted for assassination. Though the murders were virtually simultaneous, they plainly constituted more than one act. Further, the three murders were indisputably related since the purpose for each was facilitation of the desired change in leadership of the Bonanno crime family. Though the murders themselves were quickly completed, both the nature of the Commission, which was the alleged

RICO enterprise, and the criminal nature of the Bonanno family, control of which the murders were designed to achieve, made it clear beyond peradventure that there was a threat of continuing racketeering activity. The evidence was plainly ample to permit the jury to infer that the murders were part of a RICO pattern.

CONCLUSION

We conclude that the nearly simultaneous murders of three persons as part of the conduct of the affairs of an organized crime enterprise constituted a "pattern of racketeering activity" within the meaning of § 1961(5). We remand the matter to the panel for further proceedings consistent with this ruling.

OAKES, *Circuit Judge* (concurring):

I concur in Judge Kearse's opinion and her analysis of RICO's "pattern" requirement. I write separately because it is important to emphasize that Indelicato's "pattern" of racketeering activity did not consist solely of the three murders at Joe & Mary's Restaurant on July 12, 1979. Proof of these murders was necessary but not sufficient to prove a RICO pattern of racketeering activity. This is a case where evidence concerning the nature of the RICO enterprise also served to prove the existence of a pattern of racketeering activity. Facts external to the predicate acts—the three murders—were essential to prove relatedness and the threat of continuity.

This was the quintessential racketeering case. The indictment, the proof, and the trial judge's charge demon-

strate that Indelicato was not an "independent contractor" called upon to commit an isolated crime. On the contrary, he was associated for some years with the ultimate criminal enterprise, the Commission of La Cosa Nostra. Indelicato committed murders which were critical to the enterprise's achieving its goal of resolving Family leadership disputes; these were not "isolated acts of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

The indictment further charged that one of the purposes of the Commission enterprise was to "extend[ ] formal recognition to newly-elected Bosses of La Cosa Nostra Families, and [to] resolv[e] leadership disputes within a Family," as well as to "keep[ ] persons inside and outside La Cosa Nostra in fear of the Commission by identifying the Commission with threats, violence, and murder." Among the means used by the Commission to advance these general purposes was the resolution of "a leadership dispute within the Bonanno Family . . . by authorizing the murders of Carmine Galante, a/k/a 'Lilo,' who was Boss of the Bonanno Family, and Leonard Coppola and Giuseppe Turano." Thus, the indictment charged that there was an important connection between Indelicato's conduct and the overall, common purposes of the racketeering enterprise. The murders were part of a larger plan, a reorganization or realignment of the Bonanno Family by the Commission.

The evidence was that in 1979, Indelicato was a formally inducted Soldier in the Bonanno Family, a Family that, because of its many factional disputes, was managed directly by the Commission. As a "made" member, Indelicato necessarily learned the Mafia rules set down by the Commission and took the oath to abide by those rules and

to obey the Commission. Indelicato knew of the exclusively criminal purposes of the Commission and knew it had been engaging in, and that it would continue to engage in, racketeering activity.

Indelicato was chosen to carry out a murder plan so important that the Commission itself had the exclusive power to authorize it—namely, the assassination of the Boss of a La Cosa Nostra Family. Indelicato's conspiracy with the Commission to murder the three involved planning which continued over a significant time period, beginning in June 1979, when the getaway car eventually used in the killing was stolen. There was evidence that a few days before July 12, Louis Giongetti—an associate of Indelicato—was instructed to collect a cache of shotguns and handguns and place them in the trunk of a car, and to return with them to a bar where Indelicato and another Mafioso were waiting. Indelicato was promoted to captain in the Bonanno Family as a reward for the killings.

The district judge correctly instructed the jury on the elements of the RICO substantive offense. He used language specifically approved as embodying the "observations in footnote 14" of *Sedima, United States v. Teitler*, 802 F.2d 606, 612 (2d Cir. 1986), when he described the "pattern" requirement for the jury:

> Whether you are considering a pattern of loansharking, extortion, labor law violations or acts of murder, . . . when you are considering whether they form a pattern as to any defendant, you must find that the defendant's acts are not isolated or disconnected. You must find that they are related or connected by some common scheme, plan, or motive. Thus you must find that the acts constituted *part of a larger pattern of activity* that characterized the defendant's

> participation in the affairs of the enterprise and you must consider and find whether or not there is a continuity plus relationship in the acts as to the defendant you are considering.

(Emphasis added.)

Thus, the jury was instructed that it could convict Indelicato only if it found his acts to be integrally related to the larger pattern of the enterprise's activities, and not merely isolated or sporadic. The criminal nature of the enterprise involved in this case provides the continuity or threat of continuity necessary to establish a pattern. I believe that this is implicit in the majority opinion; accordingly, I concur.

MAHONEY, *Circuit Judge* (concurring):

I am in general agreement with Judge Kearse's excellent opinion, and write separately only to state my disagreement with its assertion that "the concepts of relatedness and continuity are attributes of activity, not of a RICO enterprise . . . . ," a point reiterated in several variations in the majority opinion.

The Supreme Court stated in *United States v. Turkette*, 452 U.S. 576 (1981), that:

> The [enterprise] is proved by evidence of an *ongoing organization*, formal or informal, and by evidence that the associates *function as a continuing unit*.

Id. at 583 (emphasis added). It would thus appear clear that continuity is an attribute of a RICO enterprise, as well as a RICO pattern. As to relatedness, there will presumably be a relationship (1) between the associates that func-

tion as a continuing unit, and (2) between the associates and the unit.

The majority's essential point is that the discussion of relatedness and continuity in *Sedima* footnote 14 refers to the RICO pattern rather than the RICO enterprise. I agree and think that is what we should say.

Appendix C
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106—August Term, 1986

(Argued: September 9, 1987 Decided: January 31, 1989)

Docket Nos. 87-1075, 87-1076, 87-1077, 87-1078, 87-1082, 87-1083, 87-1084, 87-1085, 87-1208, 87-1209, 87-1210, 87-1211, 87-1212, 87-1213, 87-1214, 87-1215

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY SALERNO, CARMINE PERSICO, GENNARO LANGELLA, ANTHONY CORALLO, SALVATORE SANTORO, RALPH SCOPO, CHRISTOPHER FURNARI and ANTHONY INDELICATO,

Defendants-Appellants.

Before:

PRATT and MAHONEY, *Circuit Judges*, and BRIGHT, *Senior Circuit Judge*, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix C
Opinion of United States Court of Appeals

Appeals from judgments of conviction entered by the United States District Court for the Southern District of New York (Richard Owen, *Judge*) on RICO and other charges.

Affirmed in part; reversed, as to appellant Indelicato, on substantive RICO count only. Judge Bright concurs in part and dissents in part in a separate opinion.

ANTHONY CARDINALE, Boston, Massachusetts (Walter P. Loughlin, Newark, New Jersey and Judd Burstein, New York, New York, of counsel), *for Defendant-Appellant Anthony Salerno*.

CARMINE PERSICO, Pro Se, New York, New York, *for Defendant-Appellant Carmine Persico*.

FRANK LOPEZ, Brooklyn, New York (Sercarz, Schechter & Lopez, Brooklyn, New York, of counsel), *for Defendant-Appellant Gennaro Langella*.

ALBERT GAUDELLI, Flushing, New York (Walter P. Loughlin, Newark, New Jersey and Judd Burstein, New York, New York, of counsel), *for Defendant-Appellant Anthony Corallo*.

SAMUEL H. DAWSON, New York, New York (Walter P. Loughlin, Newark, New Jersey and Judd Burstein, New York, New

York, of counsel), *for Defendant-Appellant Salvatore Santoro.*

JOHN JACOBS, New York, New York (Walter P. Loughlin, Newark, New Jersey and Judd Burstein, New York, New York, of counsel), *for Defendant-Appellant Ralph Scopo.*

BARRY FALLICK, New York, New York (Rochman, Platzer & Fallick, New York, New York, of counsel), *for Defendant-Appellant Christopher Furnari.*

ROBERT BLOSSNER, New York, New York (Mark F. Pomerantz, Warren L. Feldman, David T. Gradberg, Fischetti & Pomerantz, New York, New York, of counsel) *for Defendant-Appellant Anthony Indelicato.*

JOHN F. SAVARESE, Assistant United States Attorney for the Southern District of New York, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Aaron R. Marcu, Assistant United States Attorney, Michael Chertoff and John Gilmore Childers, Special Assistant United States Attorneys, New York, New York, of counsel), *for Appellee.*

MAHONEY, *Circuit Judge*:

Anthony Salerno, Carmine Persico, Gennaro Langella, Anthony Corallo, Salvatore Santoro, Ralph Scopo, Chris-

topher Furnari and Anthony Indelicato appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, Richard Owen, *Judge*, after an eleven week jury trial. All appellants were convicted of RICO conspiracy, 18 U.S.C. § 1962(d) (1982), and substantive RICO, 18 U.S.C. § 1962(c) (1982), violations. All appellants except Indelicato were convicted of conspiracy to commit extortion and twelve counts of extortion or attempted extortion, in violation of 18 U.S.C. § 1951(a) (1982). Scopo was convicted as a principal, and all other appellants except Indelicato were convicted as aiders and abettors, 18 U.S.C. § 2 (1982), of six labor bribery violations, 29 U.S.C. § 186(b)(1) (Supp. IV 1986). Corallo and Santoro were convicted of conspiracy to make extortionate extensions of credit in violation of 18 U.S.C. § 892 (1982). The non-RICO convictions correspond to the predicate acts of the two RICO counts. In addition, Indelicato was charged with three RICO predicate acts of murder, which the jury found he committed, for which there were no corresponding non-RICO counts in the indictment.

Each defendant except Indelicato was sentenced to a total of one hundred years imprisonment. Indelicato was sentenced to forty years imprisonment for his two RICO violations. Corallo and Santoro were each sentenced to total fines of $250,000 and assessed costs of prosecution. All other appellants except Indelicato were each sentenced to total fines of $240,000 and assessed costs of prosecution. Indelicato was fined $50,000. In addition to challenging their convictions on numerous grounds, appellants also challenge the severity of these sentences.

By order entered April 1, 1988, this court determined to hear the appeal of defendant Indelicato in banc, limited to

the issue addressed in Point II of his brief and Point VI of the government's brief filed with this panel (*i.e.*, whether the simultaneous murders of Carmine Galante, Leonard Coppola and Giuseppe Turano constituted a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1962(c) (1982)). The in banc court thereafter decided that issue adversely to Indelicato and remanded the case to this panel for further proceedings consistent with the in banc ruling. *See United States v. Indelicato*, Nos. 87-1085, 87-1215, slip op. (2d Cir. Jan. 13, 1989).

We affirm the judgment of the district court, except that we reverse the conviction of Indelicato on the substantive RICO count.

Background

The RICO enterprise alleged in the indictment is an organization known as the "Commission" of La Cosa Nostra, a nationwide criminal society which operates through local organizations known as "families." The indictment alleged, and substantial evidence at trial established, that the Commission has for some time acted as the ultimate ruling body over the five La Cosa Nostra families in New York City and affiliated families in other cities. The general purpose of the Commission is to regulate and facilitate the relationships between and among the several La Cosa Nostra families, and more specifically to promote and coordinate joint ventures of a criminal nature involving the families, to resolve disputes among the families, to extend formal recognition to "bosses" of the families and on occasion resolve leadership disputes within a family, to approve the initiation or "making" of new members of the families, and to establish rules governing the families, officers and members of La Cosa Nostra. There are five

New York City families (*i.e.*, the Genovese, Gambino, Colombo, Lucchese and Bonanno families). Since the late 1970's, the Commission was controlled by the bosses of four of those families, often acting through their deputies. Due to internal instability, the Bonanno family was denied a seat on the Commission during this period.

The government established that from the late 1970s until 1985, Salerno was first acting boss and subsequently boss of the Genovese family; Corallo was boss of the Lucchese family, which Santoro served as "underboss" and Furnari as "consigliere" (the positions ranking immediately below the family boss); Persico was boss of the Colombo family, Langella its underboss, and Scopo a member of that family and the president and business manager of the District Council of Cement and Concrete Workers, Laborers International Union of North America (the "District Council"); and Indelicato was a member of the Bonanno family, who was approved by the Commission for promotion to the rank of "capo" (*i.e.*, leader of a subordinate group within the family) some time after his participation in the murder of Carmine Galante and two associates, at the direction of the Commission. Philip Rastelli, a rival to Galante for Bonanno family leadership, was originally named a defendant, but was severed from the trial of this case because he was on trial in the Eastern District of New York in another criminal case. Paul Castellano, boss of the Gambino family, was also named a defendant, but was murdered prior to trial.

The indictment alleged racketeering acts related to three general Commission schemes.

The first scheme, an extortion and labor bribery operation known as the "Club," involved all appellants except Indelicato. The Club was an arrangement between the

Commission, several concrete construction companies working in New York City, and the District Council, a union headed by Scopo. The Club was a cooperative venture among the Families, and the Commission set rules and settled major disputes arising out of the scheme. The rules of the Club were: only such construction companies as the Commission approved would be permitted to take concrete construction jobs worth more than two million dollars in New York City; any contractor taking a concrete job worth more than two million dollars would be required to pay the Commission two percent of the construction contract price; the Commission would approve which construction companies in the Club would get which jobs and would rig the bids so that the designated company submitted the lowest bid; the Commission would guarantee "labor peace" to the construction companies in exchange for compliance with the rules of the Club; and the Commission would enforce compliance by threatened or actual labor unrest or physical harm, even to the point of driving a company out of the concrete business. According to the government, seven concrete construction companies were participants in this extortionate scheme.

The second scheme, a loansharking conspiracy, involved appellants Corallo and Santoro. Corallo's nephew, John DiLeo, had been running a loansharking operation on Staten Island, in Gambino family "territory," without the permission of the Gambino family. DiLeo's son-in-law, who was the son of a Gambino family member and was engaged in criminal activities with DiLeo, was then ordered to conduct those activities under the supervision of the Gambino family, and DiLeo complained to Corallo, the boss of the Lucchese family. Several recorded conversations show that DiLeo asked Corallo to intercede with Paul Castellano and the Gam-

bino family to resolve this dispute. At Corallo's direction, Santoro and Salvatore Avellino, Corallo's driver, met with Paul Castellano and two other Gambino family members. As a result, the Lucchese and Gambino families reached an accord allowing DiLeo to continue his illegal activities on Staten Island as long as he was not doing so on his own; he was to report to Corallo, and the Gambino family was to be kept informed concerning DiLeo's activities. DiLeo was subsequently ordered by Corallo to continue reporting to him, and surveillance photographs show that DiLeo did in fact continue to meet with Avellino and Corallo after the accord was reached.

The third scheme involved the murder of Carmine Galante and his associates, Giuseppe Turano and Leonard Coppola, on July 12, 1979, allegedly as part of a Commission plan to end the internal Bonanno family dispute between Galante and Philip Rastelli. Only Indelicato, the alleged hit man, was charged with the murders of Galante and his associates as predicate acts in the RICO counts. The three men were shot, allegedly by Indelicato and several accomplices, while they were sitting together on the terrace of Turano's restaurant in Brooklyn. A palmprint on the door handle of the getaway car, as well as eyewitness reports and expert testimony, tied Indelicato to the murders. The government introduced surveillance evidence showing that Indelicato, a Bonanno family member, reported to Gambino family underboss Aniello Dellacroce and Bonanno family consigliere Stefano Canone approximately one-half hour after the killings. Dellacroce and Canone were originally named as defendants, but both died of natural causes in 1985. The murders were the only predicate acts with which Indelicato was charged.

Further factual matters will be set forth in the discussion of the particular issues to which they relate.

Discussion

Appellants urge numerous grounds for reversal. The ones which merit consideration are: (a) claims of insufficiency of the evidence as to (1) extortion, (2) Corallo's involvement in the Club operations, (3) loansharking conspiracy, and (4) the nexus of the predicate acts of murder to the Commission; (b) Indelicato's claim that his prosecution for substantive RICO and RICO conspiracy violations is barred by the applicable statute of limitations; (c) challenges to the admissibility of certain evidence; (d) claims by Corallo, Salerno and Santoro that certain exculpatory tape recordings were erroneously excluded; (e) double jeopardy and jurisdictional claims asserted by Persico and Langella; (f) a claim by Persico that the jury should have been sequestered for the entire trial, rather than only during its deliberations; (g) a claim by Furnari that his counsel was burdened by a conflict of interest which requires a new trial; (h) a claim by all appellants that certain *Brady* material was improperly withheld by the government, necessitating a new trial; and (i) challenges by all defendants to the severity of their sentences. Indelicato also raised a substantial question whether the simultaneous murders of Carmine Galante, Leonard Coppola and Giuseppe Turano constituted a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1962(c) (1982); as indicated earlier, this question was determined by the Second Circuit in banc, rather than by this panel.

A. *Claims as to Insufficiency of the Evidence.*

Before considering appellants' specific claims as to insufficiency of the evidence, it is important to review the general standards by which these contentions are to be

assessed. As we stated in *United States v. Badalamenti*, 794 F.2d 821 (2d Cir. 1986):

> [I]n evaluating [such] claim[s], we must view the evidence in the light most favorable to the government and construe all possible inferences in its favor, see, e.g., *United States v. Martino*, 759 F.2d 998, 1002 (2d Cir. 1985). If "*any* rational trier of fact could have found the essential elements of the crime," the conviction must stand. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2786, 61 L.Ed.2d 560 (1979) (emphasis in original).

Id. at 828. Furthermore,

> It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States v. Manton*, 2 Cir., 107 F.2d 834, 839, and cases cited.
>
> Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and collocation of circumstances." *United States v. Manton*, *supra*.

Glasser v. United States, 315 U.S. 60, 80 (1942); *see Burks v. United States*, 437 U.S. 1, 17 (1978).

We now turn to appellants' specific assertions of insufficiency.

1. *Claimed Insufficiency as to Extortion (predicate acts 5 and 8-13, counts 10 and 16-21).*

All appellants except Indelicato were convicted on thirteen counts of extortion or attempted extortion, 18 U.S.C.

§ 1951(a) (1982), which also correspond to predicate acts in the two RICO counts. These counts concern the "Club" scheme, according to which concrete construction companies were allegedly coerced into paying the Commission two percent of any contract over two million dollars. In exchange, the Commission "guaranteed" labor peace, enforceable primarily through its control over the District Council, of which appellant Scopo was president and business manager. Appellants concede that the evidence was sufficient on five counts, involving victims X.L.O. Concrete Corp. (counts 4, 6 and 8) and Technical Concrete Construction Corp. (counts 12 and 14), principals of which testified at trial.[1] As to the remaining seven counts, involving Century-Maxim Construction Corp. (count 10), Cedar Park Concrete Corp. (count 16), North Berry Concrete Corp. (count 17), G & G Concrete Corp. (count 18) and S & A Concrete Company, Inc. (counts 19-21), appellants argue that the government failed to prove either that payments were made, or that any payments were made by the contractors "out of a reasonable fear of retaliation if they failed to do so," citing *United States v. Daley*, 564 F.2d 645, 650 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978) *United States v. Rastelli*, 551 F.2d 902, 904-05 (2d Cir.), *cert. denied*, 434 U.S 831 (1977); and *United States v. Tolub*, 309 F.2d 286, 289 (2d Cir. 1962).

Appellants were charged, however, with both extortion and attempted extortion, 18 U.S.C. § 1951(a) (1982), and it is accordingly not necessary to prove the victims' actual fear of retaliation, but "only an attempt to instill fear."

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1 Although no express concession is made as to count 3, which charges a general conspiracy to extort in violation of 18 U.S.C. § 1951(a) (1982), the concession as to the sufficiency of the evidence to sustain convictions for violation of counts 4, 6, 8,12 and 14 appears applicable to count 3.

United States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977) (citing *Carbo v. United States*, 314 F.2d 718, 740-41 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964)), *cert. denied*, 435 U.S. 952 (1978). Moreover, the government need not prove an attempt to instill fear of violence, but need only prove an attempt to instill fear of economic harm. *See United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987) (in banc).

To prove such an attempt, the government introduced evidence establishing that all five of the victims in the disputed counts were members of the Club and that the Commission required that all Club members pay the two percent tribute. There was also specific evidence, as to each of these five companies, that the Commission took measures to enforce their obedience to Commission rule. Recorded conversations revealed that: Century-Maxim Construction Corp. was compelled to "pa[y] a penalty . . . [b]ecause they robbed the Families"; Cedar Park Concrete Corp. was forced to go out of the concrete business because it would no longer make payments; an associate reported to Scopo about having "made North Berry [Concrete Corp.] pay the money"; Salerno, Santoro and other associates actively monitored the status of payments by G & G Concrete Corp. and set a Commission meeting to discuss dissatisfaction with payments by G & G and others; and S & A Concrete Company, Inc. could take no job without prior approval by a Commission representative. In sum, "the evidence was plain that nonpayment [of the two percent tribute] would result in preclusion from or diminished opportunity for some existing or potential economic benefit." *United States v. Capo*, 817 F.2d at 951.

The fact, moreover, that persons known by the victims to be organized crime figures established and coordinated

the elaborate work allocation and payment scheme reinforces the conclusion that the scheme involved at least an attempt to instill fear. *See Carbo v. Untied States*, 314 F.2d at 740-41 (reputation for dangerousness of underworld figure relevant to issue whether there was an instillation of fear). In this connection, we note that officers of Technical Concrete Construction Corp. and X.L.O. Concrete Corp. testified that Scopo and the Commission used the threat of labor unrest, the disruption of concrete supplies, and the defendants' reputation for violence to enforce the rules of the Club.

2. *Claimed Insufficiency as to Corallo's Involvement with the Club (predicate acts 1-13 and counts 3-21).*

Corallo contends that the evidence was insufficient to establish his involvement in the "Club," and therefore to convict him on the extortion and labor bribery predicates and substantive counts. Corallo bases this contention upon the assertion that the tape recordings from Corallo's Jaguar automobile do not implicate him in Club activities. This claim is without merit, however, since the other evidence on this point was ample. The evidence other than the Jaguar tapes demonstrated that Corallo was a Commission member and that the Commission directed the Club; that Corallo specifically discussed disputes concerning payments from concrete manufacturing companies with Salerno and Santoro; that Corallo's Lucchese family consigliere, appellant Furnari, participated in a meeting with Salerno's representatives at which the Club scheme was extensively discussed and reference was made to Corallo as having participated in the operation of the scheme; and that Corallo was included among those bosses who

were to meet to discuss interfamily problems with regard to the concrete construction operations.

3. *Claimed Insufficiency as to Loansharking Conspiracy (predicate act 17 and count 22).*

Corallo and Santoro contend that the evidence of their intercession, on behalf of John DiLeo, in a "turf" dispute with the Gambino family concerning DiLeo's loansharking activities in Staten Island is not sufficient to sustain the jury's findings on the loansharking conspiracy and predicates. We conclude, however that the jury could reasonably determine that the object of the dispute resolution was to facilitate DiLeo's loansharking activities and make them succeed, and that this suffices as a violation of 18 U.S.C. § 892 (1982).

Corallo and Santoro, through their intercession with the Gambino family, certainly made continued loansharking activity in Staten Island possible for DiLeo. Corallo's driver, Avellino, stated his understanding of the accord reached with the Gambino family in a recorded conversation: "What I meant, what he [Jimmy Brown, a Gambino representative at a Lucchese-Gambino meeting concerning the DiLeo matter] mean, to say, he doesn't want him to go out, uhh bookingmaking or shylocking or, or, uhh, running games or anything else like that. He says, uhh, 'On . . . .' You know, '*On his own, on his own*,' he meant to say." (Emphasis added.) The arrangement contemplated that DiLeo, a nephew of Corallo, could continue "shylocking" on Staten Island, without the Gambino family having any "claim" on him, as long as the activity was "on the record" and reported to the Lucchese family. Corallo explicitly told DiLeo that, should the Gambino family want "a favor or something" from him he should "check with us." DiLeo then stated to Corallo that "I

gotta come back . . . to you." There was surveillance evidence of subsequent meetings between DiLeo and Avellino.

The evidence is therefore sufficient to show a "working relationship" between appellants and DiLeo, *United States v. Peltz*, 433 F.2d 48, 51 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971), and to show that Corallo and Santoro were actively interested in helping DiLeo succeed. Even if the evidence is not conclusive that Corallo and Santoro contemplated any direct or immediate remuneration for their help in smoothing the way for DiLeo, that does not mean that Corallo and Santoro were not co-conspirators. *See United States v. Peltz*, 433 F.2d at 51 ("unnecessary to a conspiracy that the relationship contemplated mutual benefit"); *see also United States v. Cassino*, 467 F.2d 610, 617 (2d Cir. 1972) (evidence of "stake" in the venture sufficient where defendant protected venture from official interference, gave advice about operations, showed concern about loyalty of personnel, and sought to make venture succeed), *cert. denied*, 410 U.S 928 (1973). *See generally United States v. Zambrano*, 776 F.2d 1091, 1094-96 (2d Cir. 1985).

The evidence is also sufficient to establish the required nexus or connection between appellants' dispute-resolving activity in the DiLeo affair and the Commission enterprise.[2] *See, e.g. United States v. Robilotto*, 828 F.2d 940, 947-48 (2d Cir. 1987) (citing cases), *cert. denied*, 108 S. Ct. 711 (1988). The jury could reasonably conclude that the efforts of Corallo and Santoro were not only related to the

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2 This requirement results from 18 U.S.C. § 1962(c), which renders criminal certain actions by "any person employed by or associated with any enterprise [here, the Commission] . . . in the conduct of such enterprise's affairs . . . ."

Commission's activities, *id.* at 948, but actually furthered the Commission's goal of arbitrating interfamily disputes and coordinating criminal activities among the families.

4. *Claimed Insufficiency as to Relationship of the Galante Murders (predicate acts 14-16) to the Commission Enterprise.*

Appellants contend that there was insufficient evidence of a nexus between the Commission and the murders of Carmine Galante, Leonard Coppola and Giuseppe Turano.[3] Only Indelicato was charged with these murders (as predicate acts 14-16), which in turn supported his conviction on counts one (RICO conspiracy) and two (substantive RICO) of the indictment. Indelicato claims that since there was inadequate proof of the required connection between the murders and the Commission enterprise, his RICO convictions cannot stand. The other appellants contend that this being so, there was prejudicial misjoinder, especially considering the inflammatory nature of the evidence concerning the murder of Galante and his associates. We conclude, however, that there was adequate proof of the Commission connection, and therefore reject both of these claims.

The requirement of connection to a RICO enterprise is satisfied if the evidence is sufficient to establish either that the defendant "is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise," *or* that "the predicate offenses are related to the activities of that enterprise." *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *see United States v. Robilotto*, 828 F.2d 940, 947-

3 *See supra* note 2.

48 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 711 (1988). The evidence here is clearly sufficient to establish the second alternative, *i.e.*, that the violent elimination of Galante as boss of the Bonanno family was related to the Commission function of resolving leadership disputes within a family (here, the fractious Bonanno family which had been under close Commission superintendence for some time).

The testimony of Fred DeChristopher concerning appellant Persico's statement that he had voted against the Galante murder provided evidence that the Commission had taken a vote on the matter. This was consistent with other background evidence introduced at trial to the effect that the Commission retained for itself an exclusive prerogative to approve any murders of family bosses. Moreover, there was evidence at trial that the Commission had established a "death penalty" for anyone who might murder a boss without prior Commission approval. After the Galante murders, however, Indelicato was not eliminated, but was promoted by the Commission to the rank of "capo"

There was other specific evidence of Commission involvement in the Galante murders. The murders were a product of multifamily coordination, which is one of the functions of the Commission. In addition to the foreknowledge of the boss of the Colombo family (Persico), there was evidence that the murder was foreknown by another member of the Colombo family (Andrew Russo). The jury also viewed a surveillance tape of Indelicato being congratulated by Bonanno family consigliere Stefano Canone, and consulting with Gambino family underboss Aniello Dellacroce, at the Gambino headquarters less than half an hour after the murders.

Finally, there was testimony from an undercover agent that, because of the Bonanno family's internal dissension and instability, the Commission controlled that family very closely. At the time of the murder, there was an internal dispute between rival Bonanno bosses Philip Rastelli and Galante. There was specific testimony that after Galante was murdered, the Commission actively reorganized the Bonanno family under Rastelli and returned autonomous control to the family for the first time in a decade. The jury could reasonably conclude that the Commission approved the murder of Galante in order to resolve the Rastelli-Galante dispute and to restore order and autonomy to the Bonanno family.

We conclude that there was adequate evidence to support the jury's determination that the Galante murders occurred "in the conduct of [the Commission's] affairs" within the meaning of 18 U.S.C. § 1962(c) (1982).

B. *Indelicato's Claim that his RICO Conspiracy and Substantive RICO Convictions were Barred by the Statute of Limitations.*

Indelicato was indicted on RICO conspiracy and substantive RICO counts on November 19, 1985. All three of his alleged racketeering acts, however, occurred in 1979. Indelicato contends that his convictions on both the substantive RICO and RICO conspiracy counts are barred by the applicable five year statute of limitations, 18 U.S.C. § 3282 (1982). *See United States v. Srulowitz*, 785 F.2d 382, 390 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 156 (1987). The jury was charged that in order to convict Indelicato on the RICO conspiracy count, it must find that the Commission enterprise continued to exist after November 19, 1980, and that Indelicato continued after that date to be a coconspirator or associate of that enterprise. It was

charged that in order to convict him on the substantive RICO count, it must find that he continued to be an associate of the Commission enterprise after November 19, 1980, and that *any one* of the other defendants found to be guilty under the substantive RICO count committed a racketeering act after November 19, 1980.

Subsequent to oral argument, this court decided in *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1995 (1988), that a RICO conspiracy offense is complete, thus commencing the running of the five-year statute of limitations, only when the purposes of the conspiracy have either been accomplished or abandoned, *id.* at 713,[4] but that a substantive RICO charge is barred by limitations as to any defendant unless *that defendant* committed a predicate act within the five-year limitations period, *id.* at 714. We are, of course, bound by *Persico*, as by any Second Circuit panel decision unless it is overruled in banc or by the Supreme Court. *Board of Educ. v. Hufstedler*, 641 F.2d 68, 70 (2d Cir. 1981).

The jury here was properly charged that the conspiracy count against Indelicato must be dismissed on statute of limitations grounds unless they found that the Commission enterprise continued after November 19, 1980, and that Indelicato continued after that date as a coconspirator or an associate of that enterprise. There was ample evidence to support its determinations adverse to Indelicato on those issues. Accordingly, and pursuant to the in banc determination of this court, Indelicato's conviction for

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4 Although the issue was not raised on the facts in *Persico*, it is clear that even when a RICO conspiracy continues into the limitations period, an individual conspirator can commence the running of the statute of limitations as to him by affirmatively withdrawing from the conspiracy. *See In Re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 886 (D.C. Cir. 1981).

violation of 18 U.S.C. § 1962(d) (1982) (RICO conspiracy) will be affirmed. On the other hand, since all predicate acts committed *by Indelicato* occurred prior to November 19, 1980, *Persico* requires reversal of his conviction for violation of 18 U.S.C. § 1962(c) (1982) (substantive RICO) on limitations grounds.

C. *Objections to the Admission of Certain Evidence.*

A great deal of the government's evidence at trial consisted of recorded conversations. In addition, the government presented live testimony by, *inter alia*, Angelo Lombardo, a former acting boss of the Cleveland La Cosa Nostra family; three law enforcement witnesses who testified concerning an organized crime meeting in Appalachia, New York in 1957; Joseph Cantalupo, a former member of the Colombo family who provided both his own testimony and recordings of conversations with others; Fred DeChristopher, a cousin by marriage of defendant Persico at whose home Persico stayed while a fugitive from November, 1984 to February, 1985; and Joseph Pistone, an undercover FBI agent who successfully infiltrated the Bonanno family and, like Cantalupo, provided both his own testimony and recordings of conversations with others.

Appellants contend that much of the foregoing evidence was improperly admitted. They assert that many statements were deemed admissible, as "statement[s] by a coconspirator of a party during the course and in furtherance of the conspiracy" pursuant to Fed. R. Evid. 801(d)(2)(E), which were not in fact "in furtherance of the conspiracy" charged against the defendants. While conceding that these statements, when made by a defendant, were admissible against that defendant as an admission against interest pursuant to Fed. R. Evid. 801(d)(2)(A),

appellants contest their admissibility against all defendants. The government properly responds that if the statements in question met the requirements of Fed. R. Evid. 804(b)(3) as statements against penal interest, *or* of Fed. R. Evid. 801(d)(2)(E), they were admissible against all defendants.

Appellants also claim that a great deal of irrelevant evidence was improperly admitted. Their primary contention in this regard is that evidence was admitted which pertained to the activities of individual La Cosa Nostra families, but bore no relevance to the overarching Commission which was the RICO "enterprise" charged in this case. Appellants cite on this point *United States v. Langella*, 804 F.2d 185 (2d Cir. 1986), in which this court determined that the indictment of defendants Langella and Persico in this case did not place them in double jeopardy, despite their conviction at a prior trial relating to extortion by the Colombo family with respect to concrete construction companies working in New York City on jobs involving less than two million dollars. We concluded in *United States v. Langella*, *inter alia*, that the Colombo family and Commission enterprises alleged in the two indictments were distinct. *Id.*, 804 F.2d at 189. Appellants contend that a fair application of the *Langella* precedent at the trial of this case would have resulted in the exclusion of considerable evidence that Judge Owen erroneously admitted.

We address first appellants' contention that coconspirator statements were erroneously admitted against all defendants because those statements were not "in furtherance of the conspiracy" within the meaning of Fed. R. Evid. 801(d)(2)(E). This issue was also addressed in *United States v. Persico*, 832 F.2d 705, 715-16 (2d Cir. 1987), subsequent to oral argument in this case. In *Persico*, an

801(d)(2)(E) challenge was addressed by all defendants to testimony by Fred DeChristopher concerning statements made by Carmine Persico to DeChristopher while Persico was a fugitive in hiding at DeChristopher's house, paralleling one of the contentions made by appellants here. Rejecting that challenge, we said:

> We . . . find no error in Judge Keenan's determination that Carmine Persico's statements to DeChristopher were in furtherance of the conspiracy. DeChristopher already was a member of the conspiracy at the time Carmine Persico came to stay at his house, having been involved in the Colombo Family's efforts to skim the gambling profits of a cruise ship. Persico's statements to DeChristopher regarding the activities of the enterprise and the various roles of appellants in it clearly were in furtherance of the enterprise. Among other purposes, the statements "prompt[ed DeChristopher] to respond in a way that facilitate[d] the carrying out of criminal activity," [*United States v. Rahme*, 813 F.2d [31, 35 (2d Cir. 1987)] (citing *United States v. Katsougrakis*, 715 F.2d 769, 778 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040, 104 S. Ct 704, 79 L.Ed.2d 169 (1984)), informed DeChristopher of the "current status of the conspiracy," *id.* at 35-36 (quoting *United States v. Ammar*, 714 F.2d 238, 252 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S. Ct. 344, 78 L.Ed.2d 311 (1983)), apprised him of the progress of the conspiracy and solicited his assistance, *id.* at 36 (citing [*United States v.*] *Paone*, 782 F.2d [386, 391 (2d Cir.), *cert. denied*, 107 S. Ct. 269, 107 S. Ct. 3261 (1986)], and informed DeChristopher of the identity and activities of his coconspirators, *id.* (citing, *inter alia*, *United States v. Perez*, 702

F.2d 33, 37 (2d Cir.), *cert. denied*, 464 U.S. 1108, 103 S. Ct. 2457, 77 L.Ed.2d 1336 (1983)).

United States v. Persico, 832 F.2d at 716.

These standards accord with the general authority in this area. In addition to *United States v. Rahme* and *United States v. Paone*, cited immediately *supra* in *Persico*, *see United States v. Blackmon*, 839 F.2d 900, 912-13 (2d Cir. 1988) (statements that brief a coconspirator on current status of conspiracy are in furtherance of conspiracy); *United States v. Ruggiero*, 726 F.2d 913, 924 (2d Cir.) (statement to an undercover agent believed to be a coconspirator describing three previous murders found to be in furtherance of the conspiracy), *cert. denied*, 469 U.S. 831 (1984); *United States v. Perez*, 702 F.2d 33, 37 (2d Cir.) (statement concerning the composition of a partnership held to be in furtherance of conspiracy because it prepared a coconspirator for his role), *cert. denied*, 462 U.S. 1108 (1983); *see also United States v. Mangan*, 575 F.2d 32, 44 (2d Cir.) (statements giving a general description of the conspiracy construed as enlisting coconspirator or briefing him on the scheme, thus satisfying the "in furtherance" requirement), *cert. denied*, 439 U.S. 931 (1978); *United States v. Annunziato*, 293 F.2d 373, 380 (2d Cir.) (statements concerning illegal payments construed as informing son about father's policies should a similar situation arise in the future, and thus in furtherance of conspiracy to make payments), *cert. denied*, 368 U.S. 919 (1961).

Appellants contend, however, that certain trial testimony and many of the recorded conversations admitted at trial consisted of mere "idle chatter" or purely narrative descriptions of past events that in no way furthered the conspiracy. *See United States v. Lieberman*, 637 F.2d 95,

103 (2d Cir. 1980) ("in furtherance" requirement not satisfied by conversation that amounts to no more than idle chatter); *United States v. Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964) (mere narrative account of past activities not in furtherance of conspiracy). *But see United States v. Paone*, 782 F.2d at 390-91 (narratives of past events satisfy Rule 801(d)(2)(E) when they apprise coconspirator of progress of conspiracy or are designed to induce his assistance); *United States v. Ruggiero*, 726 F.2d at 924 (surrounding circumstances establish that accounts of past murders were made in furtherance of conspiracy).

An examination of the recorded conversations and trial testimony challenged by appellants as violative of Rule 801(d)(2)(E) does not sustain their contentions. Many of the challenged recordings include discussions by defendants and their associates concerning the progress of law enforcement investigations into the Commission's affairs, monitoring of the indictment and arrest of coconspirators, and assessments of revelations by the media concerning the Commission, including the highly damaging confessions of former Commission member Joseph Bonanno on the television program "60 Minutes." *See United States v. DePeri*, 778 F.2d 963, 981-82 (3d Cir. 1985) (statements of coconspirators apprising each other of efforts to avoid indictment and conviction are in furtherance of conspiracy), *cert. denied*, 475 U.S. 1110 (1986). While recorded conversations of Corallo, Avellino and Santoro concerning the Bonanno interview included many comments by the declarants about the history and rules of the Commission, these admissions were not idle chatter or mere narrations of past events, but rather contributed to an assessment of what Bonanno had and had not revealed about the Commission, and the impact of the revelations. A number of the recorded conversations include discus-

sions by Commission members or associates about interfamily disputes and how to resolve them. These discussions furthered the Commission's purpose, as specifically alleged in the indictment, of resolving disputes and coordinating criminal activities among the families in New York and other American cities.[5]

In many of the conversations, Commission members and high ranking members of individual families discuss the identities and consider the qualifications of various candidates for "made" status within La Cosa Nostra. The evidence at trial clearly established that the Commission made the final decisions about who would be accepted as "made" members of the various families. Other conversations include discussions of Commission rules and structure, which served the Commission conspiracy by educating family members concerning Commission policy and control, thus insuring obedience and knowledgeable participation within the highly structured and secretive criminal network. *See United States v. Rahme*, 813 F.2d at 35-36 (statements that maintain cohesiveness among conspirators are in furtherance of the conspiracy).

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5 In one of their numerous evidentiary challenges, appellants contest the admissibility of a recorded conversation of Avellino (Corallo's driver and a Lucchese family member) in which he discusses how, in cooperation with the Gambino family, to control a labor union. This conversation obviously furthered the Commission's purpose of coordinating joint ventures among the La Cosa Nostra Families. Moreover, although the union was not one of those involved in the "Club" scheme charged in this indictment, the evidence was properly admitted under Fed. R. Evid. 404(b) to show the background of interfamily relationships and the development of interfamily trust in the area of union control, the Commission's unique interfamily scheme for achieving such control, and the Commission's capacity to coordinate multifamily ventures in the area of union control. *See, e.g., United States v. Brennan*, 798 F.2d 581, 589-90 (2d Cir. 1986) ("inclusionary" approach to Rule 404(b) followed in Second Circuit).

The testimony of witnesses Lonardo, Cantalupo, DeChristopher, and Pistone, including tape recordings of conversations in which Cantalupo and Pistone participated, relayed statements made to them by coconspirators concerning the rules, operating structure and past practices of La Cosa Nostra and the Commission. Like the statements in the recordings, these were not just casual admissions about past facts, but furthered the Commission conspiracy by educating initiates in the ways of the organization to which they were ultimately answerable.

Appellants particularly object to the testimony of DeChristopher concerning statements made to him by Persico when Persico was hiding out in DeChristopher's home, and by another Colombo family member, Andrew Russo. The trial court specifically instructed the jury that the statements of Russo concerning Colombo family affairs were not offered against any defendant but were only admissible as background on DeChristopher's initial involvement with Russo. Russo made those statements when he was cultivating DeChristopher for service to the Colombo family, which ultimately led to service of the Commission when DeChristopher was selected to harbor Persico, a Commission member. Given the limiting instruction, there was no error in admitting the Russo statements.

As for Persico's statements to DeChristopher, it is obvious that DeChristopher's house had become Persico's base of operations. Accordingly, Persico had to tell DeChristopher who to trust, who could come to the house, and who held what positions in the Colombo family. He also had to brief DeChristopher on the organizational workings of the Commission. *See United States v. Persico*, 832 F.2d at 716 (finding statements made by Persico to

DeChristopher while Persico was hiding out in DeChristopher's house to be in furtherance of Colombo Family racketeering conspiracy).

We conclude that appellants' contentions based upon alleged failure to comply with Fed. R. Evid. 801(d)(2)(E) are unavailing, and we therefore need not address the government's alternative position that the challenged evidence was admissible against all defendants pursuant to Fed. R. Evid. 804(b)(3). We note in this connection that since the "in furtherance" issue is essentially factual, we will not reverse the district court's determination of that issue unless it is clearly erroneous. *United States v. Persico*, 832 F.2d at 716; *United States v. Rahme*, 813 F.2d at 36. Further, even if *arguendo* there were some evidence that was erroneously admitted in the course of this lengthy trial, it would be unlikely that reversible error resulted. *United States v. Paone*, 782 F.2d at 391. We note finally, as appellants concede, that the opinion of the Supreme Court in *Bourjaily v. United States*, 107 S. Ct. 2775 (1987), conclusively establishes that "the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)." *Id.* at 2783 (footnote omitted).

Appellants' claims as to relevance fare no better. Appellants' basic contention in this regard, premised upon the determination in *United States v. Langella*, 804 F.2d 185 (2d Cir. 1986), *cert. denied*, 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-788), that the Commission and the Colombo family are distinct RICO enterprises for double jeopardy purposes, is misconceived. Where the alleged purpose of the Commission enterprise as stated in the indictment is "to regulate and facilitate the relationships

between and among La Cosa Nostra families," it is obvious that proof concerning the essential "enterprise" element of the charged RICO offenses will entail considerable evidence relating to those families, even though the individual families are (as determined in *United States v. Langella*) separate RICO enterprises from the Commission. *Cf. United States v. DeFillipo*, 590 F.2d 1228, 1234 (2d Cir.) (admissibility of prior conspiracy conviction as evidence of similar act not inconsistent with treatment of two conspiracies as separate for double jeopardy purposes), *cert. denied*, 442 U.S. 920 (1979); *United Stases v. Booth*, 673 F.2d 27, 30 (1st Cir.) (same), *cert. denied*, 456 U.S. 978 (1982). Accordingly, and especially since we review the trial court's rulings as to relevance only for abuse of discretion, *see United States v. Sindona*, 636 F.2d 792, 800 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981), we find no merit in appellants' evidentiary objections premised upon *United States v. Langella*.

D. *Claim that Exculpatory Evidence Was Erroneously Excluded.*

Corallo, Salerno and Santoro claim that the district court abused its discretion in excluding three tape recordings in which Salerno and others discussed defendant Scopo's relationship to Technical Concrete Construction Company and Scopo's indictment in another case involving construction companies, and in denying their motion for severance based upon that exclusion. Judge Owen found that the evidence had little if any probative value, and that the evidence prejudiced other defendants in the case by bringing up the prior indictment which implicated codefendants Scopo, Persico and Langella. The evidence could only have had the questionable value of showing that Corallo, Salerno and Santoro may not have been

involved in *another conspiracy* charged in *another indictment* that was in some ways similar to the conspiracy charged in this case, but which differed in the essential aspect that the contracts were for less than two million dollars and thus did not implicate the Commission and its two percent rule. Given the limited value of the evidence to Corallo, Santoro and Salerno, and the high degree of prejudice to codefendants from this similar act evidence, the trial judge did not abuse his discretion. Also, given Judge Owen's assessment of the lack of significant probative value, it was not an abuse of discretion for him to deny the motion to sever the case against Corallo, Santoro and Salerno after he excluded their proffered evidence.

E. *Double Jeopardy and Jurisdictional Claims Asserted by Persico and Langella.*

Persico and Langella renew the double jeopardy argument advanced in their unsuccessful motion to dismiss the indictment, the denial of which motion was affirmed in *United States v. Langella*, 804 F.2d 185 (2d Cir. 1986), *cert. denied*, 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-788). They have shown us no reason to depart from *Langella*.

By supplemental brief filed with the court's permission, however, Persico and Langella raise a related argument that because the mandate of this court did not issue in *Langella* until after they were tried in this case, the district court proceeded without jurisdiction in that trial and their resulting convictions are consequently void.

Following their conviction in *Langella* on June 13, 1986, Persico and Langella moved to dismiss the indictment against them in this case on grounds of double jeopardy. Judge Owens denied that motion, an expedited appeal was

taken to this court, as authorized by *Abrey v. United States*, 431 U.S. 651, 662 (1977), and we issued an order on September 8, 1986 which stated:

> Appellants Gennaro Langella and Carmine Persico appeal from the denial of their motions to dismiss the indictment against them on double jeopardy grounds. The Court, having rejected the contentions of appellants, and trial of the indictment having been scheduled to begin on September 8, 1986, it is
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> ORDERED, that the order of the United States District Court for the Southern District of New York, Richard B. Owen, *Judge*, be, and hereby is, affirmed in all respects, a formal opinion to be issued by the panel at a later date.

The contemplated formal opinion was issued on October 30, 1986, and the mandate of this court thereafter issued on November 18, 1986. The trial in the district court ended the next day, when guilty verdicts were returned against all defendants.

Persico and Langella seek to invoke *United States v. Rivera*, 844 F.2d 916 (2d Cir. 1988), and particularly the statement in that case that: "Simply put, jurisdiction follows the mandate." *Id.* at 921. They contend that since the mandate of this court did not issue until the virtual conclusion of their trial in the district court, that court proceeded without jursidiction as to them, as a result of which their convictions are void and they are entitled to a new trial.

Rivera, however, interpreted a provision of the Speedy Trial Act which states that:

> If the defendant is to be tried again following an appeal, . . . the trial shall commence within seventy

> days from the date the action occasioning the retrial *becomes final*.

18 U.S.C. § 3161(e) (1982) (emphasis added). *Rivera* held that in circumstances akin to those presented here, where an order was followed by a formal opinion and the mandate thereafter issued, the action of this court with respect to the appeal became "final" within the meaning of section 3162(e) upon issuance of the mandate, in accordance with the rule adopted by the seven other circuits which had considered the issue. *Rivera*, 844 F.2d at 920 (collecting cases).[6] *Rivera* distinguished the question presented by the prosecution of Persico and Langella in this case, *id.* at 921-22, which question we now address.

Numerous circuit courts have ruled that a district court may retain jurisdiction to proceed with a trial, despite the pendency of a defendant's interlocutory double jeopardy appeal, where the appeal is found to be frivolous. *See, e.g., United States v. Black*, 759 F.2d 71, 73 (D.C. Cir. 1985); *United States v. Cannon*, 715 F.2d 1228, 1231 (7th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984); *United States v. Head*, 697 F.2d 1200, 1204 & nn. 3-5 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *United States v. Hines*, 689 F.2d 934, 936-37 (10th Cir. 1982); *United States v. Bizzard*, 674 F.2d 1382, 1385 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982); *United States v. Grabinski*, 674 F.2d 677, 679 (8th Cir.) (in banc), *cert. denied*, 459 U.S. 829 (1982); *United States v. Lanci*, 669 F.2d 391, 394 (6th Cir.), *cert. denied*, 457 U.S. 1134 (1982); *United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1980); and

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6 Of these seven circuits, the only one to depart from the rule that the definitive date is the date of the circuit court's issuance of the mandate set a *later* date, the district court's receipt of it. *See United States v. Lasteed*, 832 F.2d 840, 843 (11th Cir. 1987).

United States v. Dunbar, 611 F.2d 985, 987-88 (5th Cir.) (in banc), *cert. denied*, 447 U.S. 926 (1980).

Persico and Langella contend, however, that their double jeopardy appeal in *Langella* was not frivolous, as this court in effect certified by issuing a formal opinion of affirmance, so these cases have no application here. We disagree. Clearly, in all these cases, (1) no mandate had issued "restoring" jurisdiction to the district court, since trial was allowed to proceed simultaneously with the pendency of the interlocutory appeal, and (2) the trial was allowed to proceed because of the high likelihood, in view of the meritless nature of the appeal, that the district court's ruling on double jeopardy would be affirmed. Here, however, that likelihood hardened into a certitude when this court issued its order on September 8, 1986 affirming the district court's denial of Persico and Langella's double jeopardy motion. Furthermore, the applicable "divestiture of jurisdiction" rule is not based upon statutory provisions or the rules of civil or criminal procedure. Instead, it is a judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); *see United States v. Leppo*, 634 F.2d at 104. On the admittedly unusual facts here presented, we conclude that the district court had jurisdiction to proceed with the trial of Persico and Langella on September 8, 1986.

As to the claimed conflict with *Rivera*, we note that of the nine circuits cited above which allow concurrent jurisdiction in district courts during the pendency of frivolous interlocutory appeals on double jeopardy grounds, the five which have considered the question, as well as two

other circuits, have ruled that the Speedy Trial Act mandate commences to run only upon the issuance of the circuit court's mandate terminating an interlocutory appeal (or, in the case of the Eleventh Circuit, upon the district court's receipt of it; see *supra* note 6). *See Rivera*, 844 F.2d at 920 (collecting cases); *see also United States v. Ferris*, 751 F.2d 436, 440-41 (1st Cir. 1984) (district court retains jurisdiction during appeals of "patently nonappealable orders," but appeals nonetheless suspend running of speedy trial clock).

F. *Jury Sequestration.*

Persico's claim that Judge Owen committed reversible error by refusing to sequester the jury for the entire eleven week trial, rather than merely for the five days of deliberation, is without merit. The decision to sequester the jury to avoid exposure to publicity is committed to the discretion of the court, and failure to sequester the jury can rarely be grounds for reversal. *United States v. Johnson*, 584 F.2d 148, 154-55 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979). Persico attempted no showing of actual prejudice from publicity surrounding the trial, and this is fatal to his claim. *See Johnson*, 584 F.2d at 155; *United States v. Hill*, 496 F.2d 201, 203 (5th Cir. 1974) (exercise of judge's discretion in sequestration decision will result in reversal only upon a showing of actual prejudice to the accused). We find no abuse of discretion, especially since Judge Owen repeatedly gave the jury explicit instructions not to read anything, watch anything on television, or listen to anything on the radio concerning the case. Furthermore, Persico cites no legal authority for his alternative and inherently implausible contention that it was impermissibly coercive to sequester the jury during deliberations once

the decision had been made not to sequester them during the balance of the trial.

G. *Furnari's Claim as to his Counsel's Alleged Conflict of Interest.*

Furnari contends that his motion for a new trial should have been granted because of alleged conflicts of interest affecting his attorney, James LaRossa. Furnari asserts that LaRossa was cooperating with the Justice Department in a criminal investigation in the Eastern District of New York. He further asserts that LaRossa's law firm was under investigation by the United States Attorney for the Southern District of New York with respect to certain medical clinics, had represented former codefendant Castellano, and had once invested in and done legal work for a company called "Metro Concrete" in which Castellano was apparently involved through his son-in-law. None of Furnari's claim meets the test of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), by demonstrating "that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348.

In the first place, Furnari waived his objection to LaRossa's previous representation of Castellano after a pretrial *Curcio* hearing. *See United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), and *United States v. Curcio*, 694 F.2d 14 (2d Cir. 1982). Moreover, Furnari was advised at the time to consider all aspects of LaRossa's prior relationship, both as an attorney and a business associate and friend, with Castellano.

As for LaRossa's involvement in the two investigations being conducted by the Department of Justice, Furnari has not even attempted a showing of an actual conflict of interest or in any way indicated what possible effect there

may have been upon his lawyer's trial performance, or how these investigations were in any way related to the present case. *Contrast United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984) (reversing conviction where defendant's counsel committed crime with a coconspirator of defendant, unbeknown to defendant).

Furnari has similarly made no showing of actual conflict or effect on performance resulting from LaRossa's former association with Metro Concrete. LaRossa drafted the incorporation papers for Metro Concrete, and once attempted to invest in the company. Metro was a company with which Castellano had been associated, and for that reason the grand jury had subpoenaed its incorporation papers. Metro, however, was not even mentioned in the indictment in this case. Moreover, given the fact that Furnari was on notice prior to trial concerning LaRossa's business relationship with Castellano, we are even more reluctant to accept his conclusory assertions of conflict stemming from LaRossa's prior legal service to a company with which Castellano was associated.

Finally, the denial of Furnari's post-trial motion without a full hearing does not violated *United States v. Aiello*, 814 F.2d 109, 113-14 (2d Cir. 1987). The affidavits in *Aiello* disclosed sharp disputes and genuine issues of fact as to a conflict of interest, whereas here Furnari's conclusory assertions raised no plausible issue concerning actual conflicts or adverse effects on counsel performance.

H. *Claims as to Withholding of Brady Material.*

Appellants contend that the government suppressed FBI reports, and a bail hearing statement in another case made by an Assistant United States Attorney for the Eastern District of New York, in violation of *Brady v. Maryland*,

373 U.S. 83 (1963). Appellants assert that this improperly suppressed evidence would have established that Philip Rastelli, not Carmine Galante, was the boss of the Bonanno family, thus undermining the government's position at trial that the Galante murder was authorized by the Commission, whose rule was that no boss could be murdered without Commission approval. We conclude that the undisclosed evidence was not "material" under the test of *United States v. Bagley*, 473 U.S. 667 (1985): "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682; *see also id.* at 685 (White, J., concurring in part and concurring in the judgment).

The FBI reports summarized an interview with Anthony Giliberti, a cousin of Philip Rastelli, in which Giliberti indicated that in 1975 or 1976 Rastelli was "head of the Bonanno La Cosa Nostra Family." The bail hearing statement by the Assistant U.S. Attorney included the following:

> Our position with regard to Mr. Rastelli is not inconsistent. If Mr. Teitler read our letter, we stated that in 1979 Mr. Rastelli became the undisputed boss and that—that he was a boss prior to that. That Mr. [Galante] had tried to establish himself as boss of a rival group to Mr. Rastelli, and that as a result of Mr. [Galante's] murder, Mr. Rastelli once again became undisputed boss.

We agree with Judge Owen's conclusions that: (1) there was substantial evidence that the Commission was involved in the Galante murder, whether or not he was the *undisputed* boss of the Bonanno family; (2) the statement

by the Assistant U.S. Attorney actually states that Galante was *a* boss of the dissent-ridden Bonanno family at the time he was killed; (3) Rastelli was in jail at the time Galante was murdered; (4) the FBI reports dealt with the situation in 1976, and the Assistant U.S. Attorney statement indicates a power struggle within the Bonanno family subsequent to that time; and (5) other evidence indicates that as late as 1984, Rastelli was not yet the undisputed boss of the Bonanno family in the eyes of the Commission. Far from casting doubt on the outcome of the trial, this evidence merely reinforces the government's position that the Bonanno family was in turmoil and required the intervention of the Commission to resolve a dispute between rival bosses.

Appellant Persico also argues that the failure of the government to turn over the grand jury testimony of Pasquale Bruno, an officer of Cedar Park Concrete Corporation (extortion victim in predicate act 8 and count 16), and Frederick DeMatteis, an officer of Metro Concrete (not a victim in any count), violated *Brady*. Persico argues that he was deprived of the opportunity to introduce this testimony pursuant to Fed. R. Evid. 803(b)(1). This argument is without merit.

As for Bruno, appellants were informed by the government, during trial, that they might want to interview him—indeed, Corallo's attorney investigated the matter and decided not to pursue it. Appellants never subpoenaed Bruno[7] and never raised the possibility at trial of introduc-

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7 At trial, the government took the position that it would only produce the grand jury minutes if and when Bruno was called as a witness. This does not violate *Brady*. *See, e.g., United States v. Ruggiero*, 472 F.2d 599, 604-05 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

ing his grand jury testimony under Rule 804(b)(1).[8] "[N]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir.) (citations omitted), *cert. denied*, 107 S. Ct. 3214, 3233 (1987). As for the DeMatteis testimony, Persico merely claims that it would have shown that Metro Concrete was never extorted, which is not surprising or particularly exculpatory, since Metro Concrete was not an alleged victim of the Commission extortion scheme.

I. *Challenges to Sentences.*

All appellants, except Indelicato, received prison sentences of one hundred years. Santoro, Persico, Langella, Furnari and Scopo each received consecutive twenty year sentences for Count 1 (RICO conspiracy),[9] Count 2 (substantive RICO)[10], Count 4 (extortion)[11], Count 12 (extortion), and Count 14 (extortion). Corallo and Santoro

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8 The closest appellants came to raising the possibility of admission under 804(b)(1) was the unsupported prediction that, if Bruno were called as a witness, he would invoke his fifth amendment privilege against self incrimination. *See United States v. Pelton*, 578 F.2d 701, 709-10 (8th Cir.) (where no effort to produce grand jury witness in court, mere assertion that grand jury witness' attorney had advised declarant to invoke privilege too speculative to meet proponent's burden of establishing that declarant would invoke privilege), *cert. denied*, 439 U.S. 964 (1978). Appellants did not even request a valid privilege. *See United States v. Mangan*, 575 F.2d 32, 45 n.14 (2d Cir.) (unavailability under Rule 804 requires a court ruling that the desired testimony is privileged), *cert. denied*, 439 U.S. 931 (1978).

9 18 U.S.C. § 1963(a) (Supp. IV 1986) provides for a maximum prison sentence of twenty years for violation of 18 U.S.C. § 1962(d) (1982).

10 18 U.S.C. § 1963(a) (Supp. IV 1986) provides for a maximum prison sentence of twenty years for violation of 18 U.S.C. § 1962(c) (1982).

11 18 U.S.C. § 1951 (1982) provides for a maximum prison sentence of twenty years for violation of that section.

received consecutive twenty year sentences on Counts 1, 2, 4, 12 and 25 (loansharking conspiracy)[12]. If Judge Owen had not made the sentences on all other counts concurrent, however, these defendants could have received prison terms of over three hundred years. Furthermore, although appellants received a number of consecutive sentences and maximum sentences on several counts, as was stated in *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979), "[l]ong periods of imprisonment resulting from consecutive sentences for multiple convictions have in the past been upheld as constitutional." *Id.* at 430 (Oakes, J., dissenting) (collecting cases). *See United States v. Jaramillo-Montoya*, 834 F.2d 276, 279-80 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1998 (1988); *United States v. Golomb*, 811 F.2d 787, 791 (2d Cir. 1987).

Appellants nonetheless claim that their sentences violate the eighth amendment. Furnari and Scopo specifically claim that their sentences are disproportionate to the gravity of their crimes. All appellants also claim that Judge Owen, in imposing identical one hundred year sentences upon all defendants except Indelicato, engaged in impermissibly "uniform" or "mechanistic" sentencing.

As we stated recently in *United States v. Gaggi*, 811 F.2d 47 (2d Cir.), *cert. denied*, 107 S. Ct. 3214, 3233 (1987), "[t]he Supreme Court has warned that we should not substitute our judgment for that of the sentencing court, but when applying the Eighth Amendment to decide only whether the sentence is within constitutional limits; a review that rarely requires extended analysis." *Id.* at 63 (citing *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983)).

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12 18 U.S.C. § 892(a) (1982) provides for a maximum prison sentence of twenty years for violation of that section.

As to Furnari and Scopo's contention that their culpability was not as great as their codefendants', Judge Owen noted that although Furnari and Scopo were not "bosses" or "underbosses," Furnari was "consigliere of the Lucchese Family which [is] . . . practically the equivalent of the underboss," and that he had been involved in many of the recorded meetings where intimate knowledge of the Commission's violent business was evident. With respect to Scopo, Judge Owen noted his association with the Colombo family, his importance to the Commission bosses, and his inclusion in sensitive La Cosa Nostra discussions. The Judge also considered Scopo's own recorded words, which showed that for at least fifteen years Scopo had been involved in corrupting organized labor and extorting construction contractors.

Nor do we find the district court's sentencing to be improperly mechanistic or uniform. The court articulated its consideration of individual factors in the sentencing of each defendant. While we admit that the one hundred year sentences have a certain symbolic quality, we cannot say that Judge Owen relied so heavily on abstract considerations of deterrence and so little on considerations of individual circumstances as to amount to an abuse of his wide discretion in sentencing. *See United States v. Gaggi*, 811 F.2d at 62-63.

Conclusion

We reverse the conviction of Indelicato for violation of 18 U.S.C. § 1962(c) as time-barred, and affirm on all other counts with respect to all appellants.

BRIGHT, *Senior Circuit Judge*, concurring in part and dissenting in part.

I agree with much of Judge Mahoney's excellent opinion in this case. Nevertheless, I dissent in part.

I dissent on the following issues:

1. From my review of the evidence, I do not believe that the government presents sufficient evidence to support the convictions of Corallo and Santoro on the loansharking conspiracy (predicate act 17 and count 22; *see* majority op. at 16-18).

2. Indelicato suffered convictions for participation in a RICO conspiracy (count one) and the substantive RICO offense of participating in an enterprise through a pattern of racketeering (count two). The majority has set aside the substantive RICO violation (count two) as outside the statute of limitations. (majority op. at 21-23). In my view, the RICO conspiracy conviction against Indelicato cannot stand because the evidence is insufficient to tie the Commission members to the alleged predicate acts of Indelicato—the Galante murders.

In discussing the sufficiency of the evidence, I believe it proper to observe that because the defendants may have been shown to belong to the La Cosa Nostra does not justify putting them in jail for one hundred years on evidence that does not establish guilt beyond a reasonable doubt.

While concurring on other legal issues, I express disagreement with the reasoning underlying these determinations. The panel is bound by the precedent of the in banc court's ruling in *United States v. Indelicato*, Nos. 87-1085, 87-1215 (slip op.) (2d Cir. Jan. 13, 1989) that the simultaneous Galante killings may constitute a "pattern" of racketeering activity. While I am bound by that decision, I

express disagreement with it. Further, the panel affirms the RICO conspiracy conviction of Indelicato as within the five-year statute of limitations for a RICO conspiracy on grounds that criminal conduct by Indelicato's co-conspirators (the Commission), which continued beyond the 1979 Galante murders, serve to avoid the lapse of the statute of limitations. This holding derives from the analysis of *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1995 (1988). Again, while bound by that decision, I express disagreement with it.

Discussion

A. *Evidentiary Issues on Which I Dissent*

1. *The Loansharking Conspiracy*

The jury convicted two of the defendants, Corallo and Santoro, of conspiracy to loanshark. That conviction should be cast aside. It is inadequate because, upon examination, the complete wiretaps fall short of establishing the agreement to participate in loansharking.

The majority's reliance on the recorded statements of Avellino (Corallo's driver) is misplaced. The majority quotes only the last sentence of Avellino's understanding of an agreement reached by the Gambino/Lucchese representatives as to DiLeo's activities on Staten Island.

> What I meant, what he [Jimmy Brown, a Gambino representative at a Luchese/Gambino meeting concerning the DiLeo matter] meant, to say, he doesn't want him to go out, uhh, bookmaking or shylocking or, or, uhh, running games or anything else like that. He says, uh, 'On . . . .' You know, '*On his own, on his own*' he meant to say.

See majority op. at 16-17.

However, several days later Corallo met directly with DiLeo and the following conversation was recorded.

CORALLO: • • • You don't pay attention to that son-in-law of yours, you hear.

DILEO: No, I'm not worried about him. You know what the trouble is, *they're bullshitting that*, you know, *I'm with nobody*, and nobody, you know.

CORALLO: *They're right.*

DILEO: They're right.

CORALLO: They're right. You say they're right.

DILEO: Right.

CORALLO: They're somebody, they're full of shit.

DILEO: Right, but what you suppose . . .

CORALLO: Let them come and tell me.

DILEO: Right. Weren't you supposed to settle this with him?

CORALLO: It's all settled, it's all settled.

DILEO: There's no problem, *I got no obligation to him.*

CORALLO: *You got no obligations to nobody. You listening*?

DILEO: Right. And if any . . .

CORALLO: And if they come to you, they, they want a favor or something, you, you'll look into it.

DILEO: Right.

CORALLO: And you check with us.

DILEO: Right. But I gotta come back.

CORALLO: Don't forget.

DILEO: But I come back to you. (Emphasis added.)

Defendants-Appellants Joint Appendix, Vol. 1-A-362.

Just what does all this virtually incomprehensible speech mean? Corallo's admonitions to DiLeo that he "is with nobody and nobody" and "[y]ou got no obligations to nobody" may indicate that DiLeo is on his own as to any activity he may engage in on Gambino turf. In this light, Avellino's ambiguous narration of Brown's remarks that "he doesn't want him [DiLeo] to go out * * * bookmaking * * * [o]n his own, on his own," implies that DiLeo is being told to work with the *Gambino*, not Lucchese family. Certainly, nowhere in the taped conversations do either Santoro or Corallo indicate an agreement to involve themselves in a loansharking operation on Staten Island.

The best that can be gleaned with certainty from the tapes is that Corallo and Santoro agreed to function, and did function, as referees between the Gambino and Lucchese families. It seems, however, a large step to say that these referee activities constitute a "conspiracy to loan shark." To the contrary, it appears that Corallo and Santoro's main object in negotiating DiLeo's difficulties was to prevent an internecine family battle, not to ensure continued loansharking activity. Not only is the evidence devoid of any suggestion that Corallo and Santoro were to receive a benefit from DiLeo's continued activities, it is not even clear that their aim was to facilitate illegality. *See United States v. Peltz*, 433 F.2d 48, 51 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971) (finding a conspiracy where the purpose of the alleged illegal action is to impair the proper functioning of the government).

That the Commission's role as peace-keeper among the families should subject its officers to criminal liability for all crimes engaged in by any individual or family member of the Mafia would eviscerate the requirement of improper intent in our conspiracy laws. *See United States v. Zambrano*, 776 F.2d 1091, 1094 (2d Cir. 1985) ("To be found part of a conspiracy, [defendant] must have 'in some sense promote[d] their venture himself, [made] it his own, [had] a stake in its outcome.' ") (citation omitted). While Corallo and Santoro had a stake in preventing a family feud, the evidence fails to reveal any interest, pecuniary or otherwise, they may have had in DiLeo's further actions in Staten Island, apart from avoiding further turf quarrels.[1] In my view, the garbled conversations do not, and cannot, add up to proof beyond a reasonable doubt of the existence of a loansharking conspiracy.

2. *Whether the Galante Killings Can Be Tied to the Commission Enterprise.*

I cannot agree that adequate proof exists of the connection between the Galante murders and the Commission enterprise. The Government's proof rests, in my view, on an analogy to the movie,"The Godfather." However, a movie script does not constitute the kind of proof required to sentence men to prison for one hundred years.

Testimony that the "common law" of the La Cosa Nostra requires Commission authorization before a family

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1 Corallo's comment to DiLeo that "[a]nd if they come to you, they, they want a favor or something, you, you'll look into it. • • • And you check with us," does not establish that whatever loansharking DiLeo is going to engage in in the future must be monitored and reported back to Corallo. Rather, it supports the notion that Corallo intends to involve himself in DiLeo's affairs only insofar as they create potential conflict with the Gambino family.

boss can be killed does not prove that the "law" was observed in Galante's case. Similarly, testimony by Fred Christopher that Persico had "voted against" Galante's murder does not amount to proof that the rest of the Commission voted yes. The government's further assertion that Indelicato met at the Ravenite Social Club to be congratulated by other Commission members for a job well done rests on speculation and inference. No evidence sets out their conversation. The inference urged by the majority rests, in my view, upon an interesting but unproved scenario. Finally, the testimony of an undercover agent that the Bonanno family had been suffering from internal dissension, and that following Galente's death the Commission "reorganized" the family under another chieftain, adds nothing to the case when reorganization was inevitable upon Galante's death.

B. *Legal Issues on Which I Concur*

I now discuss briefly my views on legal issues upon which I am obligated to concur because of precedential requirement, notwithstanding that I entertain doubts about the validity of those dispositions.

1. *Indelicato's Participation in the Galante Murders Does Establish a Pattern of Racketeering to Support the RICO Conspiracy Conviction.*

Based on an in banc determination, the majority holds that Indelicato's simultaneous murders constitute a pattern for the purposes of RICO. While the Second Circuit is not alone in holding that a pattern of racketeering activity can exist were several acts are committed in the course of one scheme, there is another view. The Supreme Court, in its seminal decision, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), defined pattern as conduct

where both "continuity plus relationship are present." In the Eighth Circuit, several related acts in the furtherance of one criminal goal do not fulfill this continuity requirement. Rather, "something more than a single scheme is required in order to establish a pattern of racketeering activity." *Terre du Lac Ass'n, Inc. v. Terre du Lac, Inc.*, 834 F.2d 148, 149 (8th Cir. 1987) (citing *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986).

I believe the Eighth Circuit decisions properly mirror the statutory language. The three simultaneous Galante murders amounted to a single scheme, and thus would not constitute a pattern of racketeering activity under RICO. This construction is, I believe, more consonant with Congressional intent and accords greater respect to the plain language of the RICO statute.

2. *Indelicato's Claim that his RICO Conspiracy Conviction is Barred by the Statute of Limitations.*

Even if the murders constituted a pattern, the prosecution for conspiracy is time barred.

This court is bound by its prior decision in *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1995 (1988). The *Persico* court, confronted with the question of when the statute of limitations begins to run on a RICO conspiracy, analyzed the statute in a manner consistent with other conspiracy statutes not requiring proof of overt acts. The court thus held that the statute of limitations, as in a narcotics distribution conspiracy or Hobbs Act conspiracy, does not begin to run until the accomplishment or abandonment of the conspiratorial objectives. While bowing to the dictates of stare decisis, I nevertheless must express my disagreement with the reasoning in that opinion.

I am unconvinced that the principles governing the fixing of statutes of limitations in non-overt act conspiracies should be adopted and applied mechanically to RICO. It is true that where a conspiracy statute does not require the perpetration of an overt act, the limitations period does not begin to run until the conspiracy's objectives have been "accomplished or abandoned." *United States v. Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980). But unlike other non-overt act conspiracies, RICO expressly requires that a defendant personally commit or agree to commit the predicate acts of racketeering in furtherance of the enterprise. Indeed, the Second Circuit has emphasized this requirement in *United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986), and *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984), thus distinguishing its treatment of a RICO conspiracy from other non-overt act conspiracies based on violations of antitrust or narcotics statutes.

I believe the requirement of *personal* action (or agreement to act) on the part of *each defendant* is a limiting principle which should be incorporated into all phases of RICO analysis. The doctrines of conspiratorial liability are broad. The RICO statute is loosely worded and contains almost limitless potential for expansive interpretation. A complete grafting of the former principle upon the latter statute presents, I believe, a frightening prospect.

Under *Persico*, prosecutors can bootstrap a conspiracy charge on a defendant's substantive act committed outside the five-year limitations period by linking it to acts committed by others within the statutory period. This linkage brings both offenses within the statute of limitations. Indelicato's case provides a disturbing paradigm. Even assuming that the 1979 murders were performed at the

Commission's instance, it is unclear that Indelicato continued as an associate involved in Commission affairs. However, to convict, the jury needed only to determine that Indelicato did not affirmatively disassociate himself from the Commission conspiracy. Such determination brings the 1979 murders within the five-year limitations period by making Indelicato responsible for the many predicate acts committed by other Commission members. It is wrong to incorporate general conspiracy principles onto the RICO statute where such gross expansion of criminal liability results, without proof that the defendant engaged in any criminal activity.

Conclusion

For the reasons stated above, I would set aside the conviction of Corallo and Santoro on loansharking and I would enter a judgment of acquittal of charges made against Indelicato.[2]

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2 This acquittal is not to say that Indelicato goes free because of technicalities. In fact, if he is a murderer, the state of New York should have prosecuted him, and I believe can still do so.

Appendix D
Order of United States Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st. day of March, one thousand nine hundred and eighty-nine.

Filed: March 21, 1989

Docket Nos. 87-1075, 87-1076, 87-1077, 87-1078, 87-1082, 87-1083, 87-1084, 87-1085, 87-1208, 87-1209, 87-1210, 87-1211, 87-1212, 87-1213, 87-1214, 87-1215

UNITED STATES OF AMERICA,

Appellee,

-v.-

ANTHONY SALERNO, CARMINE PERSICO, GENNARO LANGELLA, ANTHONY CORALLO, SALVANTORE SANTORO, RALPH SCOPO, CHRISTOPHER FURNARI and ANTHONY INDELICATO,

Defendants-Appellants.

Petitions for rehearing containing suggestion that the action be reheard in banc having been filed herein by counsels for the defendants-appellants, ANTHONY SALERNO, CARMINO PERSICO, GENNARO LANGELLA, ANTHONY CORALLO, SALVATORE SANTORO, CHRISTOPHER FURNARI, RALPH SCOPO, and ANTHONY INDELICATO,

Upon consideration by the panel that heard the appeal, it is

Appendix D
Order of United States Court of Appeals
on Petition for Rehearing

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

By: /s/ _____
Fred M. Cassidy,
Chief Deputy Clerk.